(33,984)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 675

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, ETC., ET AL., APPELLANTS,

vs.

THE PROVIDENCE MILL COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1929

of Ohio and as such has jurisdiction and control over the lands and ways belonging to said State and used or intended to be used by said State as public highways, including the Miami & Erie Canal lands hereinafter mentioned and described and extending from the Maumee sidecut of said canal, at the Village of Maumee, Ohio, northwesterly to the [fol. 2] Maumee River, at the point where said Miami & Erie Canal joins said Maumee River; that defendant Richard D. Wisda is the duly appointed, qualified and acting Superintendent and Director of the Department of Public Works of the State of Ohio and as such Superintendent and Director has custodial care and management, with power to lease and sell, the public lands and waters of any and all kinds belonging to said State of Ohio, including the canal lands and canal waters of that portion of said Miami & Erie Canal above described; that the defendants, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman are the duly elected, qualified and acting County Commissioners of Lucas County, Ohio; that all the defendants are citizens of Ohio, resident within the jurisdiction of this court in this case, the defendant George F. Schlesinger residing within the Southern District of Ohio at Columbus in Franklin County in said State, and defendant Richard D. Wisda residing at the City of Defiance in Defiance County, Ohio, and said Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, residing in Lucas County, Ohio, in the Western Division of the Northern United States Judicial District of Ohio.

2. The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00) and arises under the Constitution of the United States of America.

3. On November 24, 1827, one, Peter Minor, acquired title to and became the owner of a section of land containing six hundred forty-three (643) acres lying and abutting on and along the north side of the Miami, now Maumee, River at the Wolfe, now Grand, Rapids, bounded and described as follows:

Begining at a white oak sixteen (16) inches in diameter, on the north bank of the Miami (now Maumee) River, from which a white oak sixteen (16) inches in diameter bears

north forty-five (45) degrees west, distant fourteen (14) links; thence north eighty (80) chains to a post from which a white oak twenty (20) inches in diameter bears north [fol. 3] sixteen (16) degrees west, distant twenty-three (23) links, and an elm sixteen (16) inches in diameter bears south twenty-five (25) degrees east, distant fifty-five (55) links; thence east eighty (80) chains to a post from which a white oak twenty (20) inches in diameter bears north eighty-eight (88) degrees west, distant sixty-eight (68) links; thence south eighty-eight (88) chains, sixty (60) links, to a post on the north bank of the Miami (now Maumee) River; thence up the river with the meanderings thereof to the place of beginning.

4. The State of Ohio beginning with the year 1825 provided for the construction of and thereafter constructed what, since the year 1849, has been known as the Miami & Erie Canal, extending from the Ohio River through and from the City of Cincinnati, Ohio, northerly to and through the Cities of Dayton and Defiance, Ohio, and northeasterly from the west line of the State of Ohio through said City of Defiance, Ohio, along the northerly side of or on the Maumee River into and through the City of Toledo, Ohio to Lake Erie; that said canal was so constructed in three sections, the first section of which was completed about the year 1834, known as the Miami Canal and extending from the Ohio River to the City of Dayton, Ohio, the second section of which was completed about the year 1845, known as the Miami Extension Canal and extending from the City of Dayton, Ohio, northerly to the mouth of the Auglaize River at the City of Defiance, Ohio, and the third section of which was begun in the year 1837 and completed in the year 1842, known as the Wabash & Erie Canal and extending from the west state line of the State of Ohio northeasterly to and through said City of Defiance, Ohio, there connecting with said Miami Extension Canal and extending on northeasterly along or on the Maumee River on the north side thereof to and through the City of Toledo, Ohio, to Lake Erie. Said Wabash & Erie Canal was constructed along the north bank of said Maumee River and northeasterly from said City of Defiance, as aforesaid, for a distance of about twenty (20) miles, at which point said canal emp-

tied into said Maumee River and from thence on northeasterly said Maumee River formed a part and was used as a part of said canal for a distance of about twenty (20) miles to said Village of Grand Rapids, Ohio. At a point opposite said Village of Grand Rapids, Ohio, and on the north bank of said Maumee River said canal was connected with said river and constructed on northeasterly along and near the [fol. 4] north bank of said river through the Villages of Waterville and Maumee and to and through the City of Toledo as aforesaid.

5. The General Assembly of Ohio, by Act duly passed in the year 1849, provided that said above mentioned canals should thereafter constitute one canal and be known and designated by the name of the "Miami & Erie Canal"; that said canal has been completed and in operation for a period of about eighty-six (86) years and under the laws of Ohio was so constructed and completed and has been operated through a portion of the time since such construction for the purpose of navigation thereon by various kinds of canal boats and throughout all of said time for the further purpose of supplying water for hydraulic purposes to industrial plants, hydro-electric plants, mills and for other industrial purposes, said water being furnished by said State of Ohio for such purposes to users of such water along the line of said canal under leasing or sale contracts of stated periods providing for the payment of compensation in money and other considerations to the State of Ohio and under perpetual grants made by said State of Ohio to users of such water upon valuable considerations.

There has been no commercial navigation on that part of said canal between the Village of Grand Rapids and the City of Toledo, Ohio for about thirty (30) years last past.

6. Upon the acquirement by said Peter Minor of said section of land, as hereinabove described, and long prior to the beginning by the State of Ohio of the construction of said Wabash & Erie Canal, now said Miami & Erie Canal, on the north bank of said Maumee River opposite said Village of Grand Rapids, Ohio, as aforesaid, said Peter Minor constructed a dam across said Maumee River from the north shore of said river and on his said land southerly to the south shore of said river, for the purpose of storing

water above said dam to be used for hydraulic purposes in the operation of flour, feed and saw mills, as hereinafter mentioned; that at the same time said Minor constructed below and northeasterly from his said dam on the north shore of said river and on his said land a saw mill to be operated by water power through water to be drawn from the said Maumee River from above said dam through a [fol. 5] mill-race running from said river about said dam to and through said mills; and that at said time said Minor constructed a mill-race connected with said Maumee River above said dam and running northeasterly along the north shore of said river and on his said land to his said mill and thereafter for several years prior to the beginning of the construction of said Wabash & Erie Canal, as aforesaid, the exact number of years being to plaintiff unknown, said Minor used said dam and mill-race on his said land as aforesaid by carrying water from above said dam through said mill-race for and in the operation of said mill by hydraulic power thus provided.

7. Subsequent to the construction by said Peter Minor of his said dam, mill-race and mill, the State of Ohio, in the year 1837 began, and thereafter completed the construction of said Wabash & Erie Canal on the north bank of said Maumee River, as aforesaid, connecting the same with said Maumee River at the point at or near where said Minor's mill-race connected with said river on his land and said State of Ohio constructed said canal northeasterly along said Maumee River on said Minor's said land and therein used said Minor's mill-race throughout the length thereof, tore down and destroyed said saw mill and constructed said canal on northeasterly along the bank of said river to the City of Toledo as aforesaid.

For the purpose of storing and furnishing water for the operation of said canal, the State of Ohio constructed a dam across said Maumee River at a location below the location of Minor's said dam and so constructed said dam and said canal that said Minor's water powers, provided and used by him as aforesaid on his said land, were entirely destroyed, and this without first compensating him in any way for his loss and damage suffered thereby; and further without compensating him in any way for the loss of his land occupied by said canal as aforesaid.

Said dam, constructed as aforesaid by the State of Ohio, has been reconstructed from time to time by said State and continuously from its first construction in 1842 has been maintained at its present location and is known as the Grand Rapids, Ohio, State Dam. It is built of concrete, [fol. 6] indestructible by use or wear, running from the north shore of said Maumee River southerly to the south shore of said river, about twelve hundred (1200) feet long and twelve (12) feet high and it thus extends across said river between the Village of Providence (unincorporated) on the north shore of said river in Lucas County, Ohio, and the Village of Grand Rapids, on the south shore of said river in Wood County, Ohio. Said canal connects with said river just above and southwesterly from said dam and extends therefrom northeasterly as aforesaid on the north shore of said river a distance of about one-half mile to and through what is known as the Guard Lock, or Lock No. 9, on said Miami & Erie Canal at said Village of Providence, Ohio, and from there on northeasterly along said Maumee River to the City of Toledo as aforesaid.

Said State Dam was constructed by the State of Ohio at a cost of at least Two Hundred Fifty Thousand Dollars ($250,000.00) and above it is stored a pool of water in said river practically continuously of the width and depth respectively of said dam and for a distance up said river of about eighteen (18) miles.

It would not be practical nor of any benefit to the State of Ohio or the public to devote the land occupied by said canal to any other use than as said canal from the point where it connects with the Maumee River as aforesaid to a point northeasterly from said Guard Lock a distance of about six hundred (600) feet.

Said Guard Lock, or Lock No. 9, was constructed by the State of Ohio as a part of said Wabash & Erie Canal prior to 1842. It was and is built of stone and except as to its gates regulating the in-flow and out-flow of water, is indestructible by use or wear.

8. To adjust in part the damage to which said Peter Minor was entitled for the destruction of his saw mill and other property as aforesaid and to compensate for his land occupied by the State of Ohio in the construction of said canal, guard lock and dam as aforesaid, said Peter Minor

and the State of Ohio (said State of Ohio acting through R. Dickenson, Acting Commissioner and Member of the Board of Public Works of said State, thereto duly author-[fol. 7] ized by law and by order of said Board made in pursuance thereof) entered into an agreement on September 1, A.D., 1842, in which the State of Ohio was designated as "Party of the First Part" and said Peter Minor was designated as "Party of the Second Part." By this agreement first party (State of Ohio) expressly in consideration of the releases, quit claims and covenants of second party (Minor) contained therein and upon condition that second party should continue to comply with the limitations, conditions and covenants contained in the agreement and perform the stipulations by him to be complied with and performed, did sell and convey to second party and to his heirs and assigns forever, subject to the limitations and conditions contained in the agreement, a sufficient quantity of water properly applied to propel eight (8) pairs of four and one-half (4½) feet millstones, with all the labor saving machinery necessary for the manufacture of superfine flour, to be applied at all seasons of the year, except when necessary for the navigation of said canal and except when breaches might occur, repairs become necessary or other unavoidable causes might prevent such supply. It was further provided in said agreement that nothing therein contained should hold the State of Ohio responsible to furnish said amount of water, or any part thereof, to second party, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns of Providence and Gilead, and said agreement and grant was entered into and made upon the following express terms, provisions, covenants and conditions:

"The water hereby leased for six of the said pairs of millstones and their appertaining machinery, is to be taken from the Wabash and Erie Canal at and immediately above the Guard Lock, being Lock No. Nine, on said Canal and near the town of Providence on the North Side of said Canal by means of suitable regulating Gates, and to be discharged into the Canal below said Guard Lock, by means of a suitable regulating weir, to be constructed in a safe, substantial

and workmanlike manner, by and at the expense of the party of the first part, as hereinafter specified.

The water for the remaining two pairs of millstones, and their appertaining machinery, is to be taken from the said Canal on its South Side; and from the level immediately above said Guard Lock by means of a regulating weir, to be constructed by and at the expense of the party of the second part, as hereinafter specified.

[fol. 8] And the said party of the second part, for and in consideration of the right to the use and occupation of said water, leased and conveyed as aforesaid, hereby releases, conveys and forever quit claims to the State of Ohio, and to her assigns forever, all right, title and interest, claim and demand of every kind whatever, against said State of Ohio, for the use and occupation of the water from the Maumee River—for the occupation of all lands used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of the party of the second part, and for the destruction or injury of and to all mills, dams and mill races, and all other property either personal or real, which has been damaged, injured or destroyed in consequence of the construction of the said Wabash and Erie Canal; excepting only the right to claim and receive an assessment of damages for the destruction of a saw mill, the property of the party of the second part, which stood on ground now occupied by said canal.

And the said party of the first part hereby agrees, that the said State of Ohio shall erect and complete within eighteen months from the date hereof at the expense of the said State, in a secure, substantial, and workmanlike manner, and keep in good repair, the regulating Gate, and weir above mentioned, to be constructed by the State, and to construct the same of stone walls of solid masonry and suitable timber and iron with the necessary embankments, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed in said Canal or any adjoining portion thereof; and under the direction and subject to the inspection of such Acting Commissioner or Engineer; The gates through which the water is to be drawn from the Canal to be so placed and formed that, together with the weir below, they may at all times be

readily made to secure a uniform and regular flow of water from the upper to the lower levels of the Canal according to the pleasure and discretion of the Acting Commissioner or Engineer, whether the hydraulic works are in operation or not.

And the said party of the second part further agrees to erect, complete and keep in good repair the regulating weir on the South side of the Canal, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a place to be furnished by the acting Commissioner or Engineer employed on said Canal, or on any adjoining part thereof, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; or to erect instead of the said weir, such feeder gate or gates, according to a plan to be furnished, as above, the work and material of which are to be approved as above; and said gates when so constructed shall be under the control and management of such Acting Commissioner or Engineer. The weir or lower sill of the feeder gates over which the water is to pass from the Canal is to be so placed and formed that the top of the weir or lower sill of the feeder gates shall not be more than six inches below the level at which it shall be designed to sustain the surface of the water in that part of the canal from whence the water is to be drawn. The said feeder gate or gates are to be so situate so constructed that any duly authorized agent of the state of Ohio may conveniently stop all the water from flowing through them, and that the quantity of water at any time to flow through them may conveniently be regulated in accordance with the intention of the parties to these presents and the description and direction of the Acting Commissioner or Engineer; the full right to direct, manage and control which, is hereby expressly reserved to the State of Ohio.

[fol. 9] And it is further expressly agreed that the party of the second part shall not, for any purpose, or in any manner whatever, obstruct the equal and regular flow of water from one line of the canal to another, nor increase the flow, nor cause the water or any part thereof, to flow out of the canal, except as hereinbefore provided; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in

or about the mill or hydraulic works propelled by water hereby leased; and the said party of the second part shall be considered and held responsible for keeping the head races and regulating gates and weirs to be by him erected as above described, constantly in good repair and free from all obstructions; and a failure to do so or any interference with the flow of the water on their part, or on the part of any other person employed in or about said mills or hydraulic works aforesaid, shall be adjudged and is hereby agreed to be determined a suspension of this lease, and of the rights and privileges of said party of the second part, growing out of this agreement, until the said party of the second part shall have paid to the proper Agent of the State of Ohio, all and singular the damages and costs of repairs which may have resulted from such failure or interference and furthermore have fully complied with these covenants.

And when at any time by the carelessness, neglect, or interference with the flow of water by the party of the second part or others in his employ, there shall occur any breach in the bank, the formation of a bar or other injury to the Canal, and also in case of the occurrence of any such injury or injuries in consequence of an unfaithful or unsubstantial construction of any of the weirs, gates, embankments or other works to be constructed by the party of the second part, or in consequence of such said works being out of repair; then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer or other proper Agent of the State, immediately repair said breach or other injury, or if such Agent of the State shall cause the same to be done (which he is hereby authorized at his option to do) then, said party of the second part shall pay to the said Agent, all the necessary expenses incurred in repairing such breach or other injury on demand.

And it is further understood and agreed that the water power hereby leased, or conveyed, shall not be used to drive or propel any mill or other machinery or works, from which saw dust chips or other rubbish will be likely to be carried, thrown or floated into the Canal, so as to form obstructions to the navigation thereof, or to clog the gates, waste or regulating weirs, or otherwise injure or obstruct

the same. And the said party of the second part shall at all times be bound to keep the canal clear of all rubbish, or other obstructions consequent in any manner, on the use of the water hereby leased, and of the works and machinery erected therefor.

And if the party of the second part shall in any respect fail to fulfill and perform all the engagements of the said party hereinbefore expressed, or shall do, or permit to be done any act or thing, hereby prohibited, or shall in any respect violate this agreement, then and in either case, all the rights and privileges derivable to said party of the second part from this agreement, shall from the time of such violation, cease and determine; until by some competent judicial judgment or decree such rights and privileges shall be duly restored; and any authorized agent of the State, shall have full power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part, and hold the same until otherwise determined by a court of [fol. 10] competent jurisdiction; and the said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed by the parties to this agreement that the head of water to be used by the party of the second part as aforesaid to propel the six pairs of millstones on the North side of said Canal, is not to be less than four and a half feet, measuring from the surface of water above said Lock to the surface of water in Canal below the lock. And that the power for said two pairs of millstones to be used on the South side of said Canal is to be so used to propel saw mills and is only to be used when there is a surplus of water in the Maumee River, after supplying the Canal with water sufficient for the purposes of navigation and for all mills and other hydraulic works that have been or may be hereafter leased from said State of Ohio. And it is further agreed that the regulating weir to regulate the flow of water from the Canal to the saw mill on the South side of the Canal as aforesaid, shall be constructed at the expense of the party of the first part, instead of the party of the second part as aforesaid, but ever thereafter to be kept in good repair by and at the expense of the second party."

9. After the execution and delivery of said above described agreement and grant under date of September 1, 1842, an award of Twenty-five Hundred Dollars ($2,500.00) was made and paid by the State of Ohio to said Minor for the loss of said saw mill, but the State of Ohio failed to deliver to said Minor from said canal on the north side thereof sufficient water to run six (6) pairs of four and one-half (4½) feet millstones and in fact delivered only enough water to run one and one-half (1½) pairs of millstones. Thereupon and prior to February 10, 1846, said Minor made claim against the State of Ohio for further adjustment under his said agreement of September 1, 1842, and on February 10, 1846, the General Assembly of the State of Ohio adopted a resolution which provided—

"that the Board of Public Works are hereby authorized to examine the claim of Peter Minor, for the nonperformance of a certain contract entered into by R. Dickinson, Acting Commissioner of the Board of Public Works with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the State and the said Minor, and that they report to the Commissioners of the Canal Fund any further sum which they may find due him, provided that the said Minor shall, before the investigation of his claim, execute and deliver to the said Board a full and final release to the State of all further claims of any description, except so much as may be awarded to him by said Board under this resolution."

Upon the adoption of said resolution by the General Assembly of Ohio as aforesaid, said Board of Public Works examined the claim of said Minor relative to the non-[fol. 11] performance by the State of Ohio of said agreement of September 1, 1842, and thereupon made a finding and ordered on February 23, 1846, first, that the power created by the water discharged around the Guard Lock near the Town of Providence estimated at one and one half (1½) millstone power, be the same more or less, should be possessed and enjoyed by said Peter Minor for his own proper use under the limitations and restrictions imposed for the use of the water for the six (6) millstone power provided for by said contract of September 1, 1842; and, second, that said Minor should be allowed a further sum of

Twenty-eight Hundred Dollars ($2800.00) which, with the water for the two (2) pairs of millstones stipulated to be taken from the south side of the canal in the contract of September 1, 1842, should be in full liquidation of all claims for damages of all and every kind sustained by said Minor in the location and construction of said canal and its appurtenances either reserved in said contract of September 1, 1842, or growing out of any failure on the part of the State to fulfill the conditions and stipulations in said contract or for the apropriation of the water of the Maumee River claimed by said Minor for hydraulic purposes, and also in payment of a piece of land not exceeding one (1) acre, situated on the north side of said canal, claimed by the Acting State Commissioner as necessary for the erection of a lock house, for which piece of land said Minor agreed to execute a conveyance to the State in fee simple.

Said finding and order was made and entered by said Board of Public Works upon and after said Minor had filed with said Board a written and duly executed final release of his claims against the State of Ohio, in which release said Minor did release, remise and forever quit claim to the State of Ohio all his right, title and interest, estate and claim in and to the ground occupied by said canal and its appurtenances and the easement necessary for the navigation thereof; and to all claims of damages for loss of water and other losses of every kind resulting from the construction of said canal and appurtenances along, through and over the premises and land owned by him and also on account of the inability of said State to supply the [fol. 12] full amount of water power provided for in said agreement of September 1, 1842; and said written release further stipulated that said Minor did reserve as compensation in part for losses resulting from said deficiency in the quantity of water leased, any and all of the water which might pass around the Guard Lock from the level of the pool of the dam to the canal below the lock, together with the two (2) pairs of millstone power, as provided for him to receive in said agreement of September 1, 1842. Said release was accepted by the State of Ohio and thereafter said State paid to said Minor said additional sum of Twenty-eight Hundred Dollars ($2800.00).

Said Minor, prior to the construction of said canal and in the exercise of his riparian rights as the owner of said

land hereinabove described, had used water from said Maumee River from above his said dam, drawing the same through said mill-race constructed by him, as aforesaid, in operating his said saw mill which was located at a point on said Maumee River on his said land and just south of and adjacent to said Guard Lock, or Lock No. 9, constructed by the State of Ohio, as aforesaid, as a part of said canal; and through said agreement and grant of September 1, 1842 and said release executed by him, said Minor reserved to himself and his heirs and assigns forever, the right to take from said canal for hydraulic purposes from just above said Guard Lock an amount of water sufficient to operate three and one-half (3½) pairs of four and one-half (4½) feet millstones and it was provided under and through said agreement and release that said Minor, his heirs and assigns, should forever be entitled to draw said water from said canal at said location as a part of the compensation to be made to him by said State of Ohio, for the occupation of his lands and his water power theretofore enjoyed by him, and to restore to said Minor, his heirs and assigns forever, his rights unimpaired as a riparian owner in the use of said water and water power for hydraulic purposes.

Said water power was used by said Minor from his said mill-race and it still is used by his successors in interest hereinafter mentioned from said canal on the south side thereof at a head or fall of from ten (10) to twelve (12) feet and developed and still does develop a water power of about two hundred twenty-five (225) horse power and is [fol. 13] of a value in excess of Seventy-five Thousand Dollars ($75,000.00).

10. About fifty (50) years ago one, Serrick, became the owner of said water power through conveyances thereof from said Peter Minor and his assigns and said Serrick also in the same manner became the owner of the land lying south of said canal, north of and on the bank of said Maumee River and adjacent to said Guard Lock, or Lock No. 9, of said canal, and erected thereon a flour mill to be operated by means of said water power; that said flour mill has since its erection, as aforesaid, been owned and operated by said Serrick and his successors in interest by means of said water power drawn from the south side of said canal,

all with the knowledge and consent of the State of Ohio, and this under and in compliance with the terms and conditions of said contract and grant of September 1, 1842 and the readjustment thereof as set forth hereinabove; that in 1922 The Defiance Gas and Electric Company an Ohio corporation, became the owner of said grant, said flour mill and the lands whereon said mill stands and the lands in connection therewith, together with all the rights and privileges provided for in said agreement and grant of September 1, 1842 to said Peter Minor, his heirs and assigns; that in 1922 said The Defiance Gas & Electric Company, being then the owner of said grant and property, did lease to the plaintiff herein, The Providence Mill Company, for a period of years ending December 19, 2004, said mill and all the equipment thereof and the lands on which it stands, together with the right under said grant to take from said canal sufficient water to be used through said mill on the south side of said canal immediately above said Guard Lock No. 9 to turn one turbine water wheel not exceeding four (4) feet in diameter and not exceeding two (2) feet high for not exceeding ten (10) hours per day during the term of said lease, said amount of water being about the amount of water called for by said grant and said readjustment releases and agreements hereinabove described between the State of Ohio and said Peter Minor; that said water lease so acquired by this plaintiff is of very great value because of the fact that through it this plaintiff is furnished with a water power for the operation of its mill at a cost and expense in generation of power for its mill far below what the cost and expense is or would be in [fol. 14] the generation of power through means of steam plants in the use of coal or other means; that the cost and expense in the upkeep and operation of plaintiff's mill is constant and not subject to all the varying changes and increase of prices in the cost of coal and the depreciation of machinery operated through means of coal or otherwise in furnishing power for plaintiff's business, and plaintiff says that there is no other source of water supply available to plaintiff for the operation of its business aside from the water obtained through said lease under said perpetual grant from the State of Ohio as aforesaid.

11. Plaintiff further says that on the 11th day of May, 1927, the General Assembly passed an Act, being Senate Bill No. 48, over the Governor's veto, providing for the abandonment of a portion of the Miami & Erie Canal for both canal and hydraulic purposes, commencing just below the head of the Maumee side-cut near Maumee, Ohio, thence southwest over and along said canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, to a point where said canal joins the Maumee River on the westerly side thereof in Providence Township, Lucas County, Ohio. Said Act provides that all leases granted to any person, firm or corporation, for canal or hydraulic purposes shall become null and void on and after sixty (60) days from the taking effect of said Act, and that the abandoned portion of said canal shall be under the supervision and control of the State Highway Director to be devoted to highway and park uses and the Director of Highways is authorized and directed to drain the water from said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal within sixty (60) days from the taking effect of said Act. Said Act further provides that the County Commissioners of Lucas County, Ohio, shall be authorized to drain the water from the abandoned portion of said canal and to prevent the water from the Maumee River from flowing into or through said abandoned portion of said canal. Said Act took effect August 10, 1927.

Said defendants threaten to and will, unless restrained therefrom by this court, drain the water from the portion of said canal so abandoned and will prevent the water from the Maumee River from flowing into and through the portion of said canal so abandoned and thus take away [fol. 15] from the plaintiff all of said water, as called for by its lease from said The Defiance Gas & Electric Company under said grant from the State of Ohio to ePter Minor, and totally deprive plaintiff of the same without compensating or paying plaintiff in any wise for the same and without making any provision in any wise for the continuance of the flow of said water nor any part thereof to plaintiff's said mill.

12. Plaintiff further says that if the defendants shall be allowed to take such action as hereinabove described, plain-

tiff's said mill and its business in connection therewith and conducted through the same by means of said water power will be totally destroyed and ruined and plaintiff will be, through such action on the part of the defendants, deprived of its property without compensation and without due process of law and wholly in violation of the grant as hereinabove set forth and described between the state of Ohio and Peter Minor, his heirs and assigns, and the lease between said The Defiance Gas & Electric Company and this plaintiff, and all this in contravention of and contrary to Section 10 of Article I of the Constitution of the United States as impairing the obligations of said contracts, and in contravention of and contrary to Section 1, of Article XIV of the Amendments to the Constitution of the United States as depriving this plaintiff of its property without due process of law and as denying it the equal protection of the laws, and contrary to and in contravention of Section 19 of Article I of the Constitution of Ohio.

Wherefore, this plaintiff prays that the defendants and all of their officers, agents, appointees and employees, may be temporarily restrained from obstructing the Miami & Erie Canal southwesterly, or elsewhere, from the plaintiff's mill by draining the water therefrom, filling up said canal or building bulkheads or embankments therein, and from in any wise preventing the flow of water in said canal and from diverting the water from said canal or causing same to be obstructed in or diverted from said canal at any point so as to prevent said water flowing to and through plaintiff's said mill, and plaintiff prays that the defendants and all of their officers, agents, appointees and employees, [fols. 16 & 17] may be temporarily restrained from doing, performing, or causing anything to be done that will prevent the flow of water in said Miami & Erie Canal to and through plaintiff's mill; that said temporary restraining order may remain in force until the hearing and determination of plaintiff's application, herein made, for an interlocutory injunction enjoining them as herein prayed; and plaintiff hereby applies and prays for an interlocutory injunction against each of said defendants, enjoining them respectively to the same extent and in the same manner as hereinabove prayed for as to said temporary restraining order;

and plaintiff prays that upon final hearing said injunction may be made perpetual and that said Senate Bill No. 48 be held to be in conflict with the Constitution of the United States and the Constitution of the State of Ohio and void; and it prays for all proper and equitable relief.

(Signed) U. G. Denman, Karl E. Burr, T. W. Christian, Solicitors for Plaintiff.

Duly sworn to by Frank Heising. Jurat omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 572

ANSWER OF GEORGE F. SCHLESINGER, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF HIGHWAYS OF THE STATE OF OHIO, AND RICHARD T. WISDA, INDIVIDUALLY AND AS SUPERINTENDENT AND DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE STATE OF OHIO—Filed Nov. 23, 1928

Now come the defendants George F. Schlesinger, individually and as Director of the Department of Highways of the State of Ohio, and Richard T. Wisda, individually and as Superintendent and Director of the Department of Public Works of the State of Ohio, and for answer to the bill of complaint of the plaintiff represent as follows:

1. These answering defendants admit the corporate capacity, the location of the principal office and place of business, the residence and the purpose of incorporation of the plaintiff; the occupancy of the milling property located immediately above Guard Lock, being Lock No. 9, on the Miami & Erie Canal, by the plaintiff; the official capacity, jurisdiction and powers of the defendant George F. Schlesinger; the official capacity, jurisdiction and powers of the defendant Richard T. Wisda; the official capacities of the defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman; the citizenship and residence of George F. Schlesinger, Richard T. Wisda, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, all as alleged in sub-

division numbered 1 of the bill of complaint of the plaintiff herein.

[fol. 19] These answering defendants deny the existence and validity of the alleged lease expiring December 19th, A. D. 2004 or of any other alleged lease whatsoever, under and by virtue of which the plaintiff claims to hold and to use the milling property set forth in subdivision 1, of said bill of complaint.

2. These answering defendants admit that the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars and arises under the Constitution of the United States of America.

3. These answering defendants admit that on November 24, 1827, Peter Minor acquired title to and became the owner of the tract of land described in subdivision numbered 3 of the bill of complaint of the plaintiff herein.

4. These answering defendants admit that beginning with the year 1825, the State of Ohio provided for the construction of and thereafter constructed what is known as the Miami and Erie Canal, at the times and places set out in subdivision numbered 4 of the bill of complaint of the plaintiff herein.

5. These answering defendants admit the name and designation, the completion and operation and the nature of the use of said canal; the leasing or sale of water for hydraulic purposes and the nature of the leases or sale contracts therefor, all as set out in subdivision numbered 5 of the bill of complaint of the plaintiff herein. These answering defendants also admit that there has been no commercial navigation on that part of said canal between the village of Grand Rapids and the city of Toledo, Ohio, for about thirty years last past.

6. These answering defendants admit the construction by Peter Minor of a dam across said Maumee River, the purpose of the erection thereof; the construction by said Minor of a mill-race and saw mill and the nature of the operation thereof; and the use by said Minor of said dam and mill-race, all as set out in subdivision 6 of the bill of complaint of the plaintiff herein.

7. These answering defendants admit that subsequent to the construction by said Peter Minor of his said dam, [fol. 20] mill-race and mill, the State of Ohio, in the year 1837, began and completed the construction of the Wabash and Erie Canal in the manner and at the places set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein. These answering defendants further admit that the State of Ohio used said Minor's mill-race and tore down and destroyed his said saw mill, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that the State of Ohio constructed a dam across said Maumee River and so constructed said dam in said canal that said Minor's water power, provided and used by him on his said land, was entirely destroyed, and this without first compensating him in any way for his loss and damage suffered thereby and without compensating him in any way for the loss of his lands occupied by said canal, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said dam so constructed by the State of Ohio has been reconstructed by said State of Ohio and is known as the Grand Rapids Ohio State Dam; that it is built of concrete; that said dam extends across said Maumee River; that said canal connects with said river and extends therefrom northeasterly to the city of Toledo, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said state dam was constructed by the State of Ohio at a cost of at least $250,000, and that above it is stored a pool of water extending up said river for about eighteen miles, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that Guard Lock, or Lock No. 9, was constructed by the State of Ohio as a part of said Wabash and Erie Canal prior to 1842 and that the same was built of stone, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants deny that said Grand Rapids Ohio State Dam is indestructible by use or wear, and that [fol. 21] said Guard Lock or Lock No. 9, except as to its

gates regulating the in-flow and out-flow of water, is indestructible by use or wear.

These answering defendants further deny that it would not be practicable or of any benefit to the State of Ohio, or the public, to devote the land occupied by said canal to any other use than as said canal from the point where it connects with the Maumee River to a point northeasterly from said Guard Lock, a distance of about six hundred feet.

8. These answering defendants admit that to adjust in part the damage to which said Peter Minor was entitled for the destruction of his saw mill and other property and to compensate said Peter Minor for his land occupied by the State of Ohio in the construction of said canal, guard lock and dam, said Peter Minor and the State of Ohio entered into an agreement on September 1, 1842, containing the provisions, conditions, stipulations and limitations set out in subdivision numbered 8 of the bill of complaint of the plaintiff herein.

9. These answering defendants admit the making of an award of $2,500.00 by the State of Ohio to said Peter Minor; the failure of the State of Ohio to deliver to said Peter Minor from said canal on the north side thereof sufficient water to run six pairs of four and one-half feet millstones; the delivery by the State of Ohio of enough water only to run one and one-half pairs of such millstones; the making of a claim by said Minor against the State of Ohio for further adjustments under his said agreement of September 1, 1842; the adoption of a resolution by the General Assembly on February 10, 1846; the examination of the claim of said Minor by the Board of Public Works; the finding and order of said Board of Public Works; the agreement of said Minor to execute a conveyance to the State of Ohio in fee simple of a piece of land not exceeding one acre situated on the north side of said canal, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein.

These answering defendants further admit the making and entry of said finding and order by the Board of Public [fol. 22] Works, the filing by said Minor with said board of a written and duly executed final release of his claims against the State of Ohio; the acceptance of said release

by the State of Ohio and the payment to said Minor of an additional sum of Twenty-eight Hundred Dollars, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said water power was used by said Minor from his said mill-race and it still is used by his successors in interest, on the south side of said canal at a head and fall of from ten to twelve feet.

These answering defendants admit that through said agreement and grant of September 1, 1842, the State of Ohio granted to said Minor, his heirs and assigns forever, the right to take from said canal for hydraulic purposes an amount of water equal to or greater than the amount which he had been using for such purposes at the same location through his said mill-race. These answering defendants further admit that said agreement of September 1, 1842, contained the provision that said Minor, his heirs and assigns, should forever be entitled to draw said water from said canal at said location as a part of the compensation to be made to him by said State of Ohio for the occupation of his lands and his water power theretofore enjoyed by him.

These answering defendants deny that through said agreement and grant of September 1, 1842, said Minor reserved to himself any rights or property whatever. These defendants deny that said agreement of September 1, 1842, was made for the purpose of restoring to said Minor, his heirs and assigns forever, his rights unimpaired as a riparian owner in the use of said water and water power for hydraulic purposes. These answering defendants deny that said water power developed and still develops a water power of about 225 horsepower and is of a value in excess of Seventy-five Thousand Dollars.

10. These answering defendants admit that one Serrick became the owner of said water power and erected thereon a flour mill to be operated by means of said water power; the ownership and operation of said mill with the knowledge and consent of the State of Ohio; the ownership of The Defiance Gas and Electric Company of said flour mills [fol. 23] and the lands whereon said mills stand and in connection therewith, together with the rights and privi-

leges provided for in said agreement and grant of September 1, 1842, to said Peter Minor.

These answering defendants deny that the said The Defiance Gas and Electric Company are the owners of any rights or privileges which could be conveyed by lease or otherwise and further deny the existence or validity of any alleged lease or agreement between the plaintiff herein and the said The Defiance Gas and Electric Company for a period of years ending December 19th, A. D. 2004, together with right to take from said canal sufficient water to be used through said mill on the south side of said canal immediately above said Guard Lock No. 9 to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet high and not exceeding ten hours per day during the aforesaid time set forth or until December 19, 2004, and of said mill and all the equipment thereof and the lands on which it stands.

These answering defendants deny that the alleged lease of plaintiff herein set forth in the foregoing is of any value. Defendants admit that there is no other source of water supply available to plaintiff for the operation of said mill.

11. These answering defendants admit that on the 11th day of May, 1927, the General Assembly of the State of Ohio passed an act, being Senate Bill No. 48, over the Governor's veto, providing for the abandonment of a portion of the Miami and Erie Canal for both canal and hydraulic purposes, as stated in subdivision 11 of the bill of complaint of the plaintiff herein, and that said act applied to the portion of said canal and contained the provisions described and set out in subdivision 11 of the bill of complaint of the plaintiff herein.

These answering defendants admit that said act took effect August 10, 1927.

These answering defendants admit that they will, unless restrained therefrom by this court, drain the water from the portion of the canal so abandoned and will prevent the [fol. 24] water from the Maumee River from flowing into and through the portion of said canal so abandoned without compensating or paying plaintiff in any wise for the same, without making any provision in any wise for the continuance of the flow of said water or any part thereof to the

plaintiff's said mill, all as set out in subdivision numbered 11 of the bill of complaint of the plaintiff herein.

12. These answering defendants deny that if they shall be allowed to take the action hereinabove described, such action will be in violation of the grant from the State of Ohio to said Peter Minor and the lease between said The Defiance Gas and Electric Company and the plaintiff herein, or in contravention of and contrary to section 10 of Article I of the Constitution of the United States, or in contravention of and contrary to section 1 of Article XIV of the Amendments to the Constitution of the United States, or contrary to and in contravention of section 19 of Article I of the Constitution of Ohio.

Wherefore, defendants pray that plaintiff's alleged cause of action herein may be dismissed and that they may be permitted to go hence without day and recover their costs herein expended.

Edward C. Turner, Attorney General of Ohio; Albert M. Calland, Special Counsel; Joseph A. Godown, Special Counsel, Solicitors for Defendants George F. Schlesinger, individually and as Director of the Department of Highways of the State of Ohio, and Richard T. Wisda, Individually and as Superintendent and Director of the Department of Public Works of the State of Ohio.

Duly sworn to by Richard T. Wisda. Jurat omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, INDIVIDUALLY AND AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO—Filed Nov. 23, 1928

Now come the defendants, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, individually and as County Commissioners of Lucas County, Ohio, and for answer to the bill of complaint of the plaintiff represent as follows:

1. These answering defendants admit the corporate capacity, the location of the principal office and place of business, the residence and the purpose of incorporation of the plaintiff; the occupancy of the milling property located immediately above Guard Lock, being Lock No. 9, on the Miami & Erie Canal, by the plaintiff; the official capacity, jurisdiction and powers of the defendant George F. Schlesinger; the official capacity, jurisdiction and powers of the defendant Richard D. Wisda; the offical capacities of the defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman; the citizenship and residence of George F. Schlesinger, Richard D. Wisda, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman; all as alleged in subdivision numbered 1 of the bill of complaint of the plaintiff herein.

These answering defendants deny the existence and validity of the alleged lease expiring December 19th, A. D. 2004 or of any other alleged lease whatsoever, under and by virtue of which the plaintiff claims to hold and to use the milling property set forth in subdivision 1, of said bill of complaint.

[fol. 26] 2. These answering defendants admit that the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars and arises under the Constitution of the United States of America.

3. These answering defendants admit that on November 24, 1827, Peter Minor asquired title to and became the owner of the tract of land described in subdivision numbered 3 of the bill of complaint of the plaintiff herein.

4. These answering defendants admit that beginning with the year 1825, the State of Ohio provided for the construction of and thereafter constructed what is known as the Miami and Erie Canal, at the times and places set out in subdivision numbered 4 of the bill of complaint of the plaintiff herein.

5. These answering defendants admit the name and designation, the completion and operation and the nature of the use of said canal; the leasing or sale of water for hydraulic purposes and the nature of the leases or sale

contracts therefor, all as set out in subdivision numbered 5 of the bill of complaint of the plaintiff herein. These answering defendants also admit that there has been no commercial navigation on that part of said canal between the village of Grand Rapids and the City of Toledo, Ohio, for about thirty years last past.

6. These answering defendants admit the construction by Peter Minor of a dam across said Maumee River, the purpose of the erection thereof; the construction by said Minor of a millrace and saw mill and the nature of the operation thereof; and the use by said Minor of said dam and mill-race, all as set out in subdivision 6 of the bill of complaint of the plaintiff herein.

7. These answering defendants admit that subsequent to the construction by said Peter Minor of his said dam, mill-race and mill, the State of Ohio, in the year 1837, began and completed the construction of the Wabash and Erie Canal in the manner and at the places set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein. These answering defendants further admit that the State of Ohio used said Minor's mill-race and fore down and destroyed his said saw mill, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

[fol. 27] These answering defendants further admit that the State of Ohio constructed a dam across said Maumee River and so constructed said dam in said canal that said Minor's water power, provided and used by him on his said land, was entirely destroyed, and this without first compensating him in any way for his loss and damage suffered thereby and without compensating him in any way for the loss of his lands occupied by said canal, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said dam so constructed by the State of Ohio has been reconstructed by said State of Ohio and is known as the Grand Rapids Ohio State Dam; that it is built of concrete; that said dam extends across said Maumee River; that said canal connects with said river and extends therefrom northeasterly

to the city of Toledo, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said state dam was constructed by the State of Ohio at a cost of at least $250,000, and that above it is stored a pool of water extending up said river for about eighteen miles, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that Guard Lock, or Lock No. 9, was constructed by the state of Ohio as a part of said Wabash and Erie Canal prior to 1842 and that the same was built of stone, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants deny that said Grand Rapids, Ohio, State Dam is indestructible by use or wear, and that said Guard Lock or Lock No. 9, except as to its gates regulating the in-flow and out flow of water, is indestructible by use or wear.

[fol. 28] These answering defendants further deny that it would not be practicable or of any benefit to the State of Ohio, or the public, to devote the land occupied by said canal to any other use than as said canal from the point where it connects with the Maumee River to a point northeasterly from said Guard Lock, a distance of about six hundred feet.

8. These answering defendants admit that to adjust in part the damage to which said Peter Minor was entitled for the destruction of his saw mill and other property and to compensate said Peter Minor for his land occupied by the State of Ohio in the construction of said canal, guard lock and dam, said Peter Minor and the State of Ohio entered into an agreement on September 1, 1842, containing the provisions, conditions, stipulations and limitations set out in subdivision numbered 8 of the bill of complaint of the plaintiff herein.

9. These answering defendants admit the making of an award of $2500.00 by the State of Ohio to said Peter Minor; the failure of the State of Ohio to deliver to said Peter Minor from said canal on the north side thereof sufficient water to run six pairs of four and one half feet millstones; the delivery by the State of Ohio of enough water only to

run one and one-half pairs of such millstones; the making of a claim by said Minor against the State of Ohio for further adjustment under his said agreement of September 1, 1842; the adoption of a resolution by the General Assembly on February 10, 1846; the examination of the claim of said Minor by the Board of Public Works; the finding and order of said Board of Public Works; the agreement of said Minor to execute a conveyance to the State of Ohio in fee simple of a piece of land not exceeding one acre situated on the north side of said canal, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein. [fol. 29] These answering defendants further admit the making and entry of said finding and order by the Board of Public Works, the filing by said Minor with said board of a written and duly executed final release of his claims against the State of Ohio; the acceptance of said release by the State of Ohio and the payment to said Minor of an additional sum of Twenty-eight hundred dollars, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said water power was used by said Minor from his said mill-race and it still is used by his successors in interest, on the south side of said canal at a head and fall of from ten to twelve feet.

These answering defendants admit that through said agreement and grant of September 1, 1842, the State of Ohio granted to said Minor, his heirs and assigns forever, the right to take from said canal for hydraulic purposes an amount of water equal to or greater than the amount which he had been using for such purposes at the same location through his said mill-race. These answering defendants further admit that said agreement of September 1, 1842, contained the provision that said Minor, his heirs and assigns, should forever be entitled to draw water from said canal at said location as a part of the compensation to be made to him by said State of Ohio for the occupation of his lands and his water power theretofore enjoyed by him.

These answering defendants deny that through said agreement and Grant of September 1, 1842, said Minor reserved to himself any rights or property whatever. These defendants deny that said agreement of September 1, 1842,

was made for the purpose of restoring to said Minor, his heirs and assigns forever, his rights unimpaired as a riparian owner in the use of said water and water power for hydraulic purposes. These answering defendants deny that said water power developed and still develops a water [fol. 30] power of about 225 horsepower and is of a value in excess of Seventy-five Thousand Dollars.

10. These answering defendants admit that one Serrick became the owner of said water power and erected thereon a flour mill to be operated by means of said water power; the ownership and operation of said mill with the knowledge and consent of the State of Ohio; the ownership of The Defiance Gas and Electric Company of said flour mills and the lands whereon said mills stand and in connection therewith, together with the rights and privileges provided for in said agreement and grant of September 1, 1842, to said Peter Minor.

These answering defendants deny that the said The Defiance Gas and Electric Company are the owners of any rights or privileges which could be conveyed by lease or otherwise and further deny the existence or validity of any alleged lease or agreement between the plaintiff herein and the said The Defiance Gas and Electric Company for a period of years ending December 19th, A. D. 2004, together with right to take from said Canal sufficient water to be used through said mill on the south side of said Canal immediately above said guard lock Number 9 to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet high and not exceeding ten hours per day during the aforesaid time set forth or until December 19, 2004, and of said mill and all the equipment thereof and the lands on which it stands.

These answering defendants deny that the alleged lease of plaintiff herein set forth in the foregoing is of any value. Defendants admit that there is no other source of water supply available to plaintiff for the operation of said mill.

11. These answering defendants admit that on the 11th day of May, 1927, the General Assembly of the State of Ohio passed an Act, being Senate Bill No. 48, over the Governor's veto, providing for the abandonment of a portion of the Miami and Erie Canal for both canal and hy-

draulic purposes, as stated in subdivision 11 of the bill of complaint of the plaintiff herein, and that said act applied to the portion of said canal and contained the provisions described and set out in subdivision 11 of the bill of com-
[fol. 31] plaint of the plaintiff herein.

These answering defendants admit that said act took effect August 10, 1927.

These answering defendants admit that they will, unless restrained therefrom by this court, drain the water from the portion of the canal so abandoned and will prevent the water from the Maumee River from flowing into and through the portion of said canal so abandoned without compensating or paying plaintiff in any wise for the same, without making any provision in any wise for the continuance of the flow of said water or any part thereof to the plaintiff's said mill, all as set out in subdivision numbered 11 of the bill of complaint of the plaintiff herein.

12. These answering defendants deny that if they shall be allowed to take the action hereinabove described, such action will be in violation of the grant from the State of Ohio to said Peter Minor and the lease between said The Defiance Gas and Electric Company and the plaintiff herein, or in contravention of and contrary to section 10 of Article I of the Constitution of the United States, or in contravention of and contrary to section 1 of Article XIV of the Amendments to the Constitution of the United States, or contrary to and in contravention of section 19 of Article I of the Constitution of Ohio.

Wherefore, defendants pray that plaintiff's alleged cause of action herein may be dismissed and that they may be permitted to go hence without day and recover their costs herein expended.

(Signed) Leroy W. Hunt, Prosecuting Attorney of Lucas County, Ohio; Herman C. Kruger, Assistant Prosecuting Attorney of Lucas County, Ohio, Solicitors for Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, Individually and as County Commissioners of Lucas County, Ohio.

[fol. 32] *Duly sworn to by Ralph E. Farnsworth. Jurat omitted in printing.*

[fol. 33] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE EVIDENCE, ETC.

In addition to the allegations and admissions made and contained in the pleadings it is hereby stipulated and agreed by and between the parties, plaintiff and defendants, and by and between their respective counsel in this suit, as follows:

1. That, so far as they are material to the issues involved in this case, the originals of the leases, agreements, grants, deeds, records of administrative boards, legislative or other resolutions, maps and diagrams, and special and general laws of the States of Ohio and Indiana and of Congress of the United States, all as listed or referred to below in this stipulation, may be considered as offered and received in evidence without formal proof and that copies of the same respectively, except said constitutional sections and said resolutions and laws, are attached hereto and may be used in evidence in lieu of the originals and be designated as "Stipulation Exhibits", numbered consecutively from 1 upward.

Stipulation Exhibit No. 1. Agreement between the State of Ohio and Peter Minor, dated September 1, 1842.

Stipulation Exhibit No. 2. Proceedings of Messrs. Follett Blickenderfer and Forrer, Members of the Board of Public Works of the State of Ohio, dated February 23, 1846, on the claim of Peter Minor under joint resolution of the General Assembly of Ohio passed February 10, 1846.

[fol. 34] Stipulation Exhibit No. 3. Lease from The Defiance Gas & Electric Company, being the Company of that name mentioned in both paragraphs 1 and 10 of the Bill of Complaint, to the plaintiff in this case, which lease was entered into in the year 1922 and expires by its terms on December 19, A. D. 2004.

Stipulation Exhibit No. 4. List of, (a), certain sections of the Constitution of Ohio, and, (b), certain legislative acts and resolutions of the General Assemblies of the States of Ohio and Indiana and of Congress of the United States.

Stipulation Exhibit No. 5. Blue print map of the Miami & Erie Canal from the Maumee River above the Grand Rapids State Dam to Toledo, Ohio.

2. That lock No. 44 on the Miami & Erie Canal mentioned in said lease from The Defiance Gas & Electric Company to the plaintiff, The Providence Mill Company, copy of which lease is Stipulation Exhibit No. 3, is the same lock referred to in the Bill of Complaint and in Stipulation Exhibit No. 5 as lock No. 9, or guard lock.

3. That said Stipulation Exhibit No. 1 is a true copy of the agreement duly executed, delivered and entered into by and between the State of Ohio and Peter Minor on the first day of September, 1842 as alleged in the Bill of Complaint.

4. That Stipulation Exhibit No. 2 is a true copy of the correctly recorded official proceedings of Messrs. Follett, Blickenderfer and Forrer, as members of the Board of Public Works of the State of Ohio, which proceedings were taken and recorded in the office of said Board of Public Works on February 23, 1846, and that said proceedings are truly made with respect to all things which said record purports to show relative to the claims of Peter Minor for readjustment of his rights with the State of Ohio under said agreement of September 1, 1842, a copy of which agreement is said Stipulation Exhibit No. 1, said proceedings of said Board of Public Works being the proceedings mentioned and referred to in the Bill of Complaint.

5. That Stipulation Exhibit No. 3 is a true copy of the [fol. 35] lease and agreement entered into, executed and delivered between The Defiance Gas & Electric Company and the plaintiff in the year 1922, being the lease mentioned and referred to in paragraphs 1 and 10 of the Bill of Complaint, said lease by its terms expiring on December 19, A. D. 2004.

6. That Stipulation Exhibit No. 5 is a map of the Miami & Erie Canal from its northeasterly end where it empties into Swan Creek in the City of Toledo, Ohio southwesterly up the Maumee River to where said canal connects with said Maumee River southwesterly from the Grand Rapids, Ohio State Dam, and that said map is a true representation thereof and of its terminals, location with respect to the

Maumee River, Broadway Street, in Toledo, Ohio, the River Road or Toledo-Napoleon Road, so-called, the location of Swan Creek into which said canal empties at its present northerly end, guard lock or lock No. 9, also known as lock No. 44, the town of Providence, unincorporated, in Lucas County, Ohio, the village of Grand Rapids, formerly Gilead, in Wood County, Ohio, the flour mill just above said guard lock and designated "Pilliod's Mill", the Grand Rapids, Ohio State Dam, the connection of said Miami & Erie Canal with the Maumee River, all as mentioned and referred to in the Bill of Complaint; and said map is a true representation of all the other matters, places and things and their respective locations which said map purports upon its face to show, including a State Highway leading southerly from said Toledo-Napoleon road across said Miami & Erie Canal about six hundred (600) feet east of said lock No. 9 and across said Maumee River into said village of Grand Rapids, Ohio.

It is further agreed that on the northerly side of said Miami & Erie Canal, beginning with said lock No. 9 and extending westerly up said river the northerly bank of said canal descends into a deep ravine to a depth of about twenty (20) feet and then and at the northerly bank of said ravine there is a steep ascent of about fifty (50) feet up to the top of the hill, on which lies said Toledo and Napoleon [fol. 36] road extending on up said Maumee River westerly from said road that leads southerly across said canal, just easterly of said lock No. 9.

7. That the sections of the Constitution of the State of Ohio, the legislative acts and resolutions of the General Assembly of the State of Ohio and of the State of Indiana and the Congress of the United States, all as listed in Stipulation Exhibit No. 4 filed hereunder in this case, and any other special or general act or resolution of said General Assembly of Ohio relating to the Miami & Erie Canal, including said resolution of the General Assembly of Ohio passed February 10, 1846 authorizing the Board of Public Works of the State of Ohio to examine and readjust the claim of said Peter Minor, shall be considered as in evidence before this court and any reviewing court so far as

relevant and material to the controversy in this suit without incorporating the same as a part of the record in this cause; and that counsel for either plaintiff or defendants may refer to or quote any provision or provisions, part or parts thereof, in argument or brief as if matters of judicial notice, subject to correction by opposing counsel through reference to and quotation from authentic publications without encumbering the record in this cause by formally incorporating the same in full as a part of the record.

8. That the ownership by said The Defiance Gas & Electric Company of water power in question in this case extends to and it is the owner of whatever water power and other rights were given to or recognized to be in Peter Minor, his heirs, successors and assigns, through said agreement of the first day of September, 1842, copy of which is said Stipulation Exhibit No. 1, and as said rights were readjusted and determined under said proceedings taken and completed between the State of Ohio, through its Board of Public Works, and said Peter Minor on February 23, 1846, a true copy of the record of which proceedings is said Stipulation Exhibit No. 2.

Said ownership by said The Defiance Gas & Electric Company is subject to the rights of the plaintiff under said [fol. 37] lease between that company and the plaintiff, a true copy of which is said Stipulation Exhibit No. 3.

9. (a) That said Grand Rapids, Ohio State Dam is constructed of the highest grade re-enforced concrete in all its parts in accordance and in compliance with the highest standard of engineering requirements for such work and construction for such purposes as said dam is required to effect as shown by the Bill of Complaint.

(b) That said guard lock, or lock No. 9 or No. 44, so-called, in all of its walls and parts except its inlet and outlet gates, is constructed of cut stone, the blocks of said stone being two (2) feet thick, three (3) feet wide and in varying lengths from two (2) feet upward, said walls being three (3) feet thick, laid in first quality cement and in compliance with the highest standard of engineering requirements for such work and construction for such purposes as said lock was required to effect as shown by the Bill of Complaint; that the frames of said inlet and outlet

gates of said lock are constructed of heavy oak timbers and the panels thereof are constructed within said frames of heavy oak planks three (3) inches in thickness, braced and held in place in compliance with the highest standard of engineering requirements for such work and construction; that the upper or inlet gate of said lock has been closed since navigation ceased on said canal as alleged in the Bill of Complaint and the water of said canal, except such thereof as is used in the operation of plaintiff's mill, passes around said lock through other gates known as waste way or regulating gates constructed by said The Defiance Gas & Electric Company, at its own cost and expense, of heavy cast-iron plates, movable for opening and closing and regulation by proper machinery, all of which regulating gates and all parts of their regulating equipment and all parts of said inlet and outlet gates of said lock are kept in repair at the cost and expense of the plaintiff.

10. That the mill occupied and operated by plaintiff as alleged in the Bill of Complaint is a flour and stock and [fol. 38] poultry feed mill, known and on Stipulation Exhibit No. 5 it is designated as "Pilliod Mill;" that it is so operated by plaintiff as alleged in the Bill of Complaint through and by the water power in question in this case under said agreement of September 1, 1842, as readjusted on the claim of Peter Minor through proceedings of the Board of Public Works and said Minor taken on February 23, 1846, a true copy of which agreement is Stipulation Exhibit No. 1 and a true copy of the record of said proceedings for readjustment being Stipulation Exhibit No. 2; and that the water used as aforesaid in the operation of said mill constitutes a water power of at least two hundred twenty-five horse-power and is of a value in excess of Seventy-five Thousand Dollars ($75,000).

11. That all the waters in said canal run northeasterly out of and from the pool of the Maumee River above the Grand Rapids, Ohio State Dam, including the water used by plaintiff in said water power as aforesaid; that said agreement of September 1, 1842 between the State of Ohio and Peter Minor, readjusted as aforesaid, is the only agreement permitting the taking of water from said Miami & Erie Canal between the point where said canal connects with the

Maumee River above and southwesterly from said Grand Rapids, Ohio State Dam and said guard lock or lock No. 9; and that said waters used by plaintiff as aforesaid pass through said mill operating the same and out into the Maumee River.

12. That the Defiance Gas & Electric Company as owner of all the rights under said agreement of September 1, 1842, readjusted as aforesaid, and the plaintiff herein as lessee of said Company have throughout the time of such ownership and leasing performed all the obligations stipulated in said agreement and readjustment as aforesaid for them, or either of them, to perform; and that plaintiff has been and still is operating its said mill under said leasing agreement with said The Defiance Gas & Electric Company since the execution and delivery thereof in 1922, and therein plaintiff has been and still is using the amount of water stipulated in said lease for it to use in such operation and therein operating said mill in the manufacture of its products herein-[fol. 39] above mentioned in this Stipulation and Agreement to the capacity thereof.

13. The Bill of Complaint in this cause may be considerad as amended by striking out the word "northwesterly" in the third line from the top of page 2 thereof and inserting in lieu thereof the word "southwesterly."

14. It is hereby agreed that this Stipulation and Agreement between the parties, plaintiff and defendants, on the evidence is only for the purposes of this case in this court and on any review thereof in any reviewing court.

The Providence Mill Company, by U. E. Denman, and Karl E. Burr, Solicitors for Plaintiff. Harry J. Kirk, Director of Highways of Ohio; Richard D. Wisda, Superintendent and Director of Public Works of Ohio, by Edward C. Turner, as Attorney General of Ohio; Albert M. Calland, and Joseph A. Godown, Solicitors for Defendants Kirk and Wisda. Roy E. Davis, Ralph E. Farnsworth, George R. Hoffman, Commissioners of Lucas County, Ohio, by Leroy W. Hunt, Prosecuting Attorney of Lucas County, and Herman C. Krueger, Assistant Prosecuting Attorney of Lucas County.

[fol. 40] STIPULATION EXHIBIT No. 1

Lease

State of Ohio

to

Peter Minor

Recorded in Record of Deeds and Leases M. & E. Canal, Office Ohio State B. P. W.

This agreement made this first day of September, A. D. 1842, between the State of Ohio, party of the first part, by R. Dickinson, Acting Commissioner and member of the Board of Public Works, thereto duly authorized by law, and by the order of the said Board made in pursuance thereof, and Peter Minor of the County of Lucas, and State aforesaid, party of the second part, Witnesseth: That said party of the first part, for and in consideration of the releases, quit claims, and covenants of the party of the second part, hereinafter contained and upon the express condition that the party of the second part shall continue, at all times, and forever, hereafter to comply with all and singular, the limitations, conditions and covenants hereinafter contained, and shall in every respect perform all the stipulations of this agreement by said party to be performed: Agrees to sell and convey and does by these presents sell and convey to the said party of the second part, his heirs and assigns forever; subject to the limitations and conditions herein contained, a sufficient quantity of water properly applied, to propel eight pairs of four and a half feet mill stones, with all the labor saving machinery necessary for the manufacture of superfine flour, to be applied at all seasons of the year; except when otherwise necessary for the navigation of the canal, or when breaches occur, repairs become necessary and other unavoidable causes prevent; provided that nothing herein contained shall hold the State of Ohio responsible to furnish the above amount of water or any part thereof to the said party of the second part, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns of Providence and Gilead.

The water hereby leased for six of the said pairs of mill stones and their appertaining machinery, is to be taken from the Wabash and Erie Canal at and immediately above the Guard Lock, being Lock No. Nine, on said Canal and near the town of Providence on the North side of said Canal, by means of suitable regulating Gates, and to be discharged into the Canal below said Guard Lock, by means [fol. 41] of a suitable regulating weir, to be constructed in a safe, substantial and workmanlike manner, by and at the expense of the party of the first part, as hereinafter specified.

The water for the remaining two pairs of mill stones, and their appertaining machinery, is to be taken from the said Canal on its South side; and from the level immediately above said Guard Lock by means of a regulating weir, to be constructed by and at the expense of the party of the second part, as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, leased and conveyed as aforesaid, hereby releases, conveys and forever quit claims to the State of Ohio, and to her assigns forever, all right, title and interest, claim and demand of every kind whatever, against said State of Ohio, for the use and occupation of the water from the Maumee River for the occupation of all lands used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of the party of the second part, and for the destruction or injury of and to all mills, dams and mill-races, and all other property either personal or real, which has been damaged, injured or destroyed in consequence of the construction of the said Wabash and Erie Canal; excepting only the right to claim and receive an assessment of damages for the destruction of a saw mill, the property of the party of the second part, which stood on ground now occupied by said Canal.

And the said party of the first part hereby agrees, that the said State of Ohio shall erect and complete within eighteen months from the date hereof at the expense of the said State, in a secure, substantial and workmanlike manner, and keep in good repair, the regulating Gate, and weir above mentioned, to be constructed by the State, and to con-

struct the same of stone walls of solid masonry and suitable timber and iron with the necessary embankments, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed on said Canal or any adjoining portion thereof; and under the direction and subject to the inspection of such Acting Commissioner or Engineer; [fol. 42] the gates through which the water is to be drawn from the Canal to be so placed and formed that, together with the weir below, they may at all times be readily made to secure a uniform and regular flow of water from the upper to the lower levels of the Canal according to the pleasure and discretion of the Acting Commissioner or Engineer, whether the hydraulic works are in operation or not.

And the said party of the second part further agrees to erect, complete and keep in good repair the regulating weir on the South side of the Canal, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed on said Canal, or on any adjoining part thereof, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; or to erect instead of the said weir, such feeder gate or gates, according to a plan to be furnished, as above, the work and material of which are to be approved of as above; and said gates when so constructed shall be under the control and management of such Acting Commissioner or Engineer. The weir or lower sill of the feeder gates over which the water is to pass from the Canal is to be so placed and formed that the top of the weir or lower sill of the feeder gates shall not be more than six inches below the level at which it shall be designed to sustain the surface of the water in that part of the canal from whence the water is to be drawn. The said feeder gate or gates are to be so situate so constructed that any duly authorized Agent of the State of Ohio may conveniently stop all the water from flowing through them, and that the quantity of water at any time to flow through them may conveniently be regulated in accordance with the intention of the parties to these presents and the description and direction of the Acting Commissioner or Engineer; the full right to direct, manage and control which, is hereby expressly reserved to the State of Ohio.

And it is further expressly agreed that the party of the second part shall not, for any purpose, or in any manner whatever, obstruct the equal and regular flow of water [fol. 43] from one line of the Canal to another, nor increase the flow, nor cause the water or any part thereof, to flow out of the Canal, except as hereinbefore provided; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mill or hydraulic works propelled by water hereby leased; and the said party of the second part shall be considered and held responsible for keeping the head races and regulating gates and weirs to be by him erected as above described, constantly in good repair and free from all obstructions; and a failure to do so or any interference with the flow of the water on their part, or on the part of any other person employed in or about said mills or hydraulic works aforesaid, shall be adjudged, and is hereby agreed to be determined a suspension of this lease, and of the rights and privileges of said party of the second part, growing out of this agreement, until the said party of the second part shall have paid to the proper Agent of the State of Ohio, all and singular the damages and costs of repairs which may have resulted from such failure or interference and furthermore have fully complied with these covenants.

And when at any time by the carelessness, neglect, or interference with the flow of water by the party of the second part or others in his employ, there shall occur any breach in the bank, the formation of a bar or other injury to the Canal, and also in case of the occurrence of any such injury or injuries in consequence of an unfaithful or unsubstantial construction of any of the weirs, gates, embankments or other works to be constructed by the party of the second part, or in consequence of such said works being out of repair, then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer or other proper Agent of the State, immediately repair said breach or other injury, or if such Agent of the State shall cause the same to be done (which he is hereby authorized at his option to do) then, said party of the second part shall pay to the said agent, all the necessary expenses incurred in repairing such breach or other injury on demand.

[fol. 44] And it is further understood and agreed that the water power hereby leased, or conveyed shall not be used to drive or propel any mill or other machinery of works, from which saw dust chips or other rubbish will be likely to be carried, thrown or floated into the Canal, so as to form obstructions to the navigation thereof, or to clog the gates, waste or regulating weirs, or otherwise injure or obstruct the same. And the said party of the second part shall at all times be bound to keep the Canal clear of all rubbish, or other obstructions consequent in any manner, on the use of the water hereby leased, and of the works and machinery erected therefor.

And if the party of the second part shall in any respect fail to fulfill and perform all the engagements of the said party hereinbefore expressed, or shall do, or permit to be done any act or thing hereby prohibited, or shall in any respect violate this agreement, then and in either case, all the rights and privileges derivable to said party of the second part from this agreement, shall from time of such violation, cease and determine until by some competent judicial judgment or decree such rights and privileges shall be duly restored; and any authorized Agent of the State shall have full power to enter upon and take possession of the premises and resume all the rights and privileges hereby granted to the party of the second part and hold the same until otherwise determined by a court of competent jurisdiction; and the said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed by the parties to this agreement that the head of water to be used by the party of the second part as aforesaid to propel the six pairs of mill stones on the North side of said Canal is not to be less than four and a half feet, measuring from the surface of water above said Lock to the surface of water in Canal below the lock. And that the power for said two pairs of mill stones to be used on the South side of said Canal is to be so used to propel saw mills and is only to be used when there is a surplus of water in the Maumee River after supplying the Canal with water sufficient for the purposes of navigation and for all mills and other [fol. 45] hydraulic works that have been or may be here-

after leased from said State of Ohio. And it is further agreed, that the regulating weir to regulate the flow of water from the canal to the saw mill, on the South side of the canal as aforesaid, shall be constructed at the expense of the party of the first part, instead of the party of the second part as aforesaid, but ever thereafter to be kept in good repair by and at the expense of the party of the second part.

In testimony whereof, the parties executed this agreement the day and year first above written.

"R. Dickinson," Acting Commissioner for the Board of Public Works. "Peter (his x mark) Minor." (Seal.)

Signed, sealed, and delivered in presence of Pliny Hoagland, Andrew Young.

Sept. 13, 1842—Acknowledged by Peter Minor, before R. Corocrett, Justice of the Peace, Lucas County, Ohio.

[fol. 46] Bond

Peter Minor
to
The State of Ohio.

Recorded in Record of Deeds and Leases
M. & E. Canal, Office Ohio State
Board of P. W.

Know all men by these presents, that I, Peter Minor of Lucas County, Ohio, am hereby held and firmly bound to the State of Ohio in the penal sum of Five Hundred Dollars, to which payment I bind myself, my heirs and assigns forever. Signed with my hand, and sealed with my seal this 15th day of July, 1846.

The conditions of the above obligation are that I hereby agree to convey to the State of Ohio within two months from this date a certain lot of ground, not exceeding one half acre agreeably to the terms of an agreement entered into between me and the State of Ohio, by the Board of Public Works, the payment of which I hereby acknowledge to have received in full. Said lot of ground to be laid off on the North side of the Wabash and Erie Canal near the head of the Maumee Rapids in Lucas County aforesaid, and

to be bounded as follows: Beginning at a point in the North line of the towing path, one chain and sixty-nine links above the head of the guard lock and running thence at right angles with the Canal north three and ½° east one chain and eighty-nine links; thence up the Canal parallel with the towing path for quantity.

(Signed) Peter (his x mark) Minor. (Seal.)

Two witnesses.

[fol. 47] STIPULATION EXHIBIT No. 2

Monday, February 23, 1846.

Present: Messrs. Follett, Blickenderfer and Forrer.

Claim of Peter Minor

The Board proceeded under the Joint Resolution of the General Assembly, passed February 10, 1846, to examine the claim of Peter Minor, which resolution is in the words following:

"Resolved by the General Assembly of the State of Ohio, that the Board of Public Works are hereby authorized to examine the claim of Peter Minor, for the non-performance of a certain contract entered into by R. Dickinson, Acting Commissioner of the Board of Public Works with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the State and the said Minor, and that they report to the Commissioners of the Canal Fund any further sum, which they may find due him, provided that the said Minor shall, before the investigation of his claim, execute and deliver to the said Board a full and final release to the State of all further claims of any description, except so much as may be awarded to him by said Board under this resolution.

"Elias F. Drake," Speaker of the House of Representatives. "Seabury Ford," Speaker of the Senate."

February 10, 1846.

In pursance of the requirement of the above Resolution the said Minor, on this day, filed with the Board, a full and final release to the State, duly executed; a copy of which release is here inserted, and is as follows:

"Know all men by these presents, that whereas, Peter Minor, did, on the first day of September, A. D. 1842, enter into an agreement with the State of Ohio, by R. Dickinson, Acting Commissioner, and Member of the Board of Public Works, by which, amongst other things, it was stipulated on the part of the said State of Ohio, that the said Peter [fol. 48] Minor, should relinquish to said State all right to claim damages for lapses consequent upon the construction of the Wabash and Erie Canal through his land and premises in Lucas County in said State, excepting a claim for the loss of a saw mill which occupied the site of the said canal; for which relinquishment, the said state would supply a water power to said Minor, upon his premises, sufficient to propel eight pairs of four feet and a half mill stones; and

Whereas, also, the General Assembly, of the State of Ohio did on the 10th day of February, A. D. 1846, pass a resolution 'authorizing the Board of Public Works to examine the claim of Peter Minor,' a copy of which is hereto attached. (See copy of Resolution above.)

Now therefore, I, the said Peter Minor, in pursuance of said resolution; and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby release, remise and forever quit claim unto the State of Ohio, all right, title and interest, estate and claim in and to the ground occupied by said canal and its appurtenances, and the easement necessary for the navigation thereof; and to all claims of damages for loss of water, and other losses of every kind, resulting from the construction of said canal and appurtenances, along, through and over the premises and land owned by me, the said Peter Minor, and also on account of the inability of said State to supply the full amount of water power provided for in the contract aforesaid. To have and to hold the aforesaid rights and privileges unto the State of Ohio forever.

I moreover agree to receive as compensation in part for losses resulting from a deficiency in the quantity of water

leased, any and all of the water which may pass around the guard lock from the level of the pool of the dam to the canal below the lock, together with the sawmill power provided for in the contract, and to receive a lease for the same [fol. 49] on the term and conditions provided for in the contract aforesaid.

In testimony whereof, I, the said Peter Minor, have hereto set my hand and seal this 23rd day of February A. D. 1846.

Peter (his mark) Minor. (Seal.)

Signed, sealed, and delivered in presence of A. B. Newburgh, B. B. Brown.

THE STATE OF OHIO,
Franklin County, ss:

Personally came before me, a Justice of the Peace, in and for said County, Peter Minor, grantor and releasor in the foregoing conveyance, and acknowledged the same to be his voluntary act and deed. Witnesseth my hand this 23rd day of Feb. A. D. 1846.

A. Patten, J. P."

Now for the purpose of more fully understanding the claim of said Peter Minor, which rests on the contract or agreement referred to in the resolution above cited, said contract is here inserted in full, and is in the words following, namely:

(Copy of said contract is Stipulation Exhibit No. 1 in this case.)

From the above contract, it will appear that the claim presented for the consideration of the Board, by the said Minor, under the resolution, consist in this: That the agents of the State having failed from want of fall in the canal and other causes to furnish to the said Minor the water necessary to propel the six run of mill stones mentioned in said contract; and from due examination, it appearing that the total of water, which may be furnished to said Minor, "at and immediately above the Guard Lock, being Lock No. 9 on said canal, and near the town of Providence," does not exceed one and a half millstone power.

The Board were constrained by the terms of the Resolution, in examining the claim of said Minor for this water,

to place a cash value on the same, with a view of determining the amount said claim when offset against "other matters in dispute" between the State and said Minor, re- [fol. 50] ferred to in said Resolution.

It will appear on reference to the terms of said contract, or agreement of Sept. 1, that in the releases of said Minor, in consideration of the grants on the part of the State, he expects and reserves "the right to claim and receive an assessment of damages for the destruction of a saw mill." This reservation from the knowledge possessed by the Board, of the ground occupied by the canal and the damage inflicted by its location on the property of said Minor, is understood to apply only to the mill, and not to the dam, or mill-race, or any other property connected with the use of the water at Providence. But by reference to an award on this reserved claim, made by the appraiser of Damages on the Wabash and Erie Canal, it would appear that notwithstanding the full release contained in the contract of September 1st, the appraisers took into consideration the general damage sustained by said Minor by the location of the canal.

This will more fully appear by reference to the "award," a copy of which is here given, and is as follows:

"Peter Minor claims damage for injury done to his property in Providence Township, Lucas County, Ohio. The applicant states in his application that he had erected and constructed at a great expense, a valuable saw-mill, mill dam and mill race, previous to the construction of the Wabash and Erie Canal, and that by the construction and location of said Wabash and Erie Canal, his mill dam, mill and race were all destroyed. Upon the examination of the above described premises, and from facts elicited of the Resident Engineer, we find that the canal is located and constructed directly upon the site that the saw mill of the applicant stood on, and that the mill was torn down and destroyed by order of the Resident Engineer, then in charge of that division of the Wabash and Erie Canal. And the applicant further claims for some 150 saw logs that he had on hand at the time of the destruction of his property, above stated; also for timber used and destroyed; also for stone taken from his premises to build and construct culverts on said Wabash & Erie Canal; also for the mill irons

either lost or become valueless by the destruction of his, the [fol. 51] applicant's, mill; for a bridge built across his mill race, and for the land occupied by said Wabash and Erie Canal.

Upon mature deliberation and considering that the applicant has laid out of the use of his mill since the year 1839, without receiving from the State any compensation whatever, after comparing the damage incurred with the benefits received, we assess the damages that the said Peter Minor has sustained, or may sustain, as aforesaid, at Two Thousand Five Hundred Dollars, as full compensation and payment of all right, interest and claim thereto.

"Joseph McCutcheon, T. J. Price."

$2,500.
February 23rd, 1846.

Peter Minor's Claim

This allowance of $2,500 is erroneously made, as we conceive, through ignorance on the part of the appraisers, of the existence of the full release contained in the contract of September 1st, of all damage beyond the value of his saw-mill, by the said Minor, or from some other cause, not understood. It is clearly a large allowance beyond the value of his mill, which except therefore, we feel warranted in taking into consideration in estimating the damage sustained by the said Minor by the failure of the State to furnish the power for the six mill stones "at and immediately above the Guard Lock near the town of Providence" mentioned in said contract of Sept. 1, 1842.

With the facts in this case fully before them, drawn from the documents and papers here exhibited, the Board adjudge and determine as follows:

First. That the power created by the water discharged around the Guard Lock near the town of Providence, estimated at one and a half mill stone power, be the same more or less, shall be possessed and enjoyed by the said Peter Minor, for his own proper use, and under the limitations and restrictions imposed for the use of the water for the six mill stone power by the contract of the 1st of September, 1842.

[fol. 52] Second. That in addition to the large excess awarded by the appraisers for his saw-mill, the said Minor shall be allowed the further sum of Two Thousand Eight Hundred Dollars, which with the water for the two pairs of mill stones, stipulated to be taken from the south side of the canal in the contract of the 1st of Sept. 1842, (to be taken from the canal under all the limitations and restrictions imposed by said contract) shall be in full liquidation of all claims for damage, of all and every kind, sustained by said Minor in the location and construction of the Wabash and Erie Canal, and its appurtenances, either reserved in said contract of the 1st of Sept. 1842, or growing out of any failure on the part of the State to fulfill the conditions and stipulations in said contract contained, or for the appropriation of the water of the Maumee River, claimed by the said Minor, for canal navigation or hydraulic purposes. And this allowance shall also be taken in satisfaction of a piece of land, not exceeding one acre, situated on the north side of the canal, claimed by the Acting Commissioner as necessary for the erection of a lock house, for which piece of land the said Minor has agreed to execute a conveyance to the State in fee simple.

The following report was made by the Board to the Commissioners of the Canal Fund:

Office of the Board of Public Works, Columbus

Feb. 23, 1846.

To E. N. Sill, Esq., Acting Fund Commissioner:

Sir: In the matter of Peter Minor, referred to the Board of Public Works, under a resolution of the General Assembly of the 10th inst., the Board have this day determined that there is due the said Minor, on an adjustment of his rights under his contract, with the State, the sum of Twenty Eight Hundred Dollars, independent of certain water power to be secured to said Minor.

By order of the Board.

A. B. Newburgh, Sec'y.

[fol. 53] Columbus, Ohio, Aug. 14th, 1912.

I, Chas. W. Diehl, Secretary of the Board of Public Works of the State of Ohio, hereby certify the foregoing

to be a true copy of the Records of said Board as recorded in Vol. 4, A, Pages 73, 74, 78, 79, 80 and 81, so far as the same related to the matter of the grant to Peter Minor on the Wabash & Erie Canal.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Public Works, the day and date above written.

"Chas. W. Diehl, Sec'y Board of Public Works."

[fol. 54] STIPULATION EXHIBIT No. 3

This indenture, made this — day of ——, 1922, between The Defiance Gas & Electric Company, a corporation organized and existing under the laws of the State of Ohio and having its principal office at Defiance, Ohio, Lessor, party of the first part, and the Providence Mill Company, a corporation organized and existing under the laws of the State of Ohio, having its principal office at Grand Rapids, Ohio, Lessee, party of the second part, witnesseth that

Whereas, the party of the first part has lately acquired certain lands and premises and other property, real and personal, of which the property hereinafter demised and leased forms part, such acquisition having been made in pursuance of the authorization of The Public Utilities Commission of the State of Ohio, in accordance with its Order #2466, dated January 27th, 1922, in and by which it is provided that the consent and approval of the Commission was granted to the acquisition by the party of the first part hereto of all property constituting the public electrical utility known as the Grand Rapids-Weston Light & Power Company, and

Whereas, included in the property so acquired by the Lessor there is a Grist Mill Building with grist mill machinery therein (known as the Pilliod Mill) which properly forms no part of the said electrical utility property, but which is physically practically inseparable from said public utility property formerly known as the Grand Rapids-Weston Light & Power Company aforesaid, and

Whereas, it is no part of the business of the Lessor to operate a grist mill and it is believed to be for the pub-

lic interest of the inhabitants in the Village of Grand Rapids and its neighborhood that a grist mill should be operated as heretofore on the property of which the premises hereby demised are a part, and

Whereas, it is the intent of these presents to provide for the satisfactory operation of the grist mill without interference with the other electrical business of the Lessor rather than for the Lessor to attempt to derive revenue from it,

[fol. 55] Now, therefore, in consideration of the facts above recited and the mutual covenants herein contained these presents witness, that The Defiance Gas & Electric Company, Lessor, as aforesaid, does hereby demise, let and lease (subject to all the covenants and conditions herein contained) to the said Providence Mill Company, its successors and assigns, the property hereinafter described now in use and useful for grist mill purposes, for the term commencing with the date of this Instrument and expiring on the 19th day of December A. D. 2004 (unless sooner terminated as herein provided) at a yearly rent of Ten Dollars ($10) a year, payable in advance on the 1st day of June in each and every year, during the aforesaid term, subject, however, as aforesaid to all the covenants and conditions herein contained to be kept and performed on behalf of the Lessee, including the conditions under which this lease may be terminated and the term thereunder terminated or forfeited to the Lessor prior to December 19, A. D. 2004, all of which conditions, provisions and limitations are to be strictly construed in accordance with their terms for the benefit of the Lessor and against the Lessee, its successors and assigns, and all of which the Lessee agrees to keep, observe and perform. The Lessor hereby acknowledges receipt of the yearly rent due June 1, 1922, for the first year of such term, or to and until June 1, 1923.

First. The premises and personal property hereby demised to the Lessee for the term aforesaid and subject to all the conditions herein contained, are as follows, viz:

All and singular the machinery, fixtures, tools and other equipment now located in the building known as the Pilliod Mill (situated near Lock No. 44 on the Miami and Erie Canal and on the so-called Peter Minor, Senior, Reserve, which Mill is located upon the property described in Para-

graph "I" of the description of the Deed, bearing date of April 3rd, 1922 and recorded on May 29, 1922 in the office of the Recorder of Deeds of Lucas County, Ohio, in Deed Book No. 573 at page 384, which machinery, fixtures, tools and other equipment aforesaid are not used or useful for electrical purposes or for the generation or transmission of electrical power or energy, but which are useful and in use for the purpose of the grist or flour mill operated in such Mill Building; together with a right, subject to the conditions and restrictions hereinafter mentioned, described and defined, to the lessee at all times to have joint access with [fol. 56] the lessor to, and joint possession with the lessor of that part of the Mill Building in which the said grist mill machinery, fixtures and stationary equipment is at present located or which at present may be used or fitted and intended for the storage of grain, meal, grist or flour for the purpose of permitting the said lessee, its successors or assigns to operate the said grist mill and to derive the revenue or income therefrom; and together with a right of way from the public road in front of said Pilliod Mill Building into the said mill and all parts thereof, now used or occupied for grist mill purposes as aforesaid, for the use of the lessee, its successors and assigns, and the customers of the mill into that part of said Pilliod Mill Building hereby intended to be demised, and together with the right to said lessee, its successors and assigns to take sufficient water (when not required by the lessor hereunder for its hydro-electrical purposes) from the Miami & Erie Canal to be used through the existing mill-race now passing under said mill, to turn one turbine wheel (of the existing wheels now installed) for the purpose of running the machinery of the grist mill or if said existing wheel shall be replaced or renewed, such right to the water shall be limited to a right to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet in height (to be placed in position of one of present existing wheels and as approved by the lessor) for not exceeding ten hours per day, when the water is not required for the hydro-electrical purposes of the lessor, of which condition the lessor shall be the sole judge.

Second. It is further understood and agreed between the parties hereto and these presents are in all respects sub-

ject to the following stipulations, provisions and conditions, upon the happening of any of which the term demised shall cease and determine, namely:

(a) If and in case the Lessee or its successors in interest, shall at any time discontinue and cease to use the machinery, fixtures, tools and equipment now used in the grinding of grist and flour and abandon the use as a grist mill for the duration of one year, the rights of said Lessee under this lease and the term of this lease shall ipso facto cease and determine at the end of such year.

(b) If and in case the said Mill Building shall be destroyed by fire, storm, flood or casualty, and shall not be rebuilt, repaired and put in operation again as a grist mill by and at the expense of the Lessee (upon the same site and location as and of no greater size and capacity than the present mill) within one year from the date of such destruction, all of said rights hereby demised to said Lessee [fol. 57] shall ipso facto cease and determine at the end of such year.

(c) If the Public Utilities Commission of the State of Ohio, or the successor of such Commission having the same or similar functions, shall at any time determine that the use of the rights hereby demised to the Lessee for grist mill purposes, (either as hereby demised or as actually made use of in operation) shall be inconsistent or interfere with the right of the Lessor hereunder to use any or all its property (including its water rights) as it may require, for electrical purposes, or shall be inconsistent with or interfere with the full and complete use and operation of the electrical utility property formerly known as the Grand Rapids-Weston Light & Power Company, authorized and intended to be conveyed to the Lessor for its full use and benefit by said Order No. 2466 of said Public Utilities Commission of the State of Ohio, then ipso facto upon the making of any such Order by the Public Utilities Commission of the State of Ohio, or upon any notice to the Lessee or its successors in interest hereunder, given either by the Public Utilities Commission of the State of Ohio or by the Lessor that such Order has been made by such Commission, then and in that case all rights of the Lessee or its succes-

sors in interest shall ip[illegible] facto cease and determine to the extent provided in said Order.

(d) It is expressly understood and agreed that the use hereby leased and demised of water from the Miami & Erie Canal for grist mill purposes shall be at all times secondary, subject and subordinate to the right of the Lessor to the use of water for its hydro-electric power plant purposes, and if and in case the Lessee or its representative from time to time in charge or control of the grist mill are notified in any manner, whether formally or informally, orally or in writing, that water must not be used for a certain time or period for grist mill purposes and shall wilfully disregard such notice (of which the Board of Directors of the Lessor shall be the sole judge) then and in that case all rights of the Lessee under this lease shall at the option of the Lessor forthwith ipso facto cease and determine.

[fol. 58] It is expressly understood and agreed that the Lessee and its successors in interest hereunder, shall at their own expense, during the term of this lease repair and keep in good repair all the machinery, fixtures, tools and equipment pertaining to the grist mill use (including such turbine water wheel as may from time to time be connected with and used in the grist mill purposes) and shall also repair and keep in good repair that portion of the Mill Building which houses, protects or covers the grist mill machinery and the storage spaces in said mill used for the storage of grain, meal, grist or flour and hereby demised, and the determination of the Board of Directors of the Lessor as to whether this covenant is fully complied with shall at all times be binding and conclusive upon the Lessee and its successors in interest hereunder, and if, in any case, at any time the Board of Directors of the Lessor shall determine and give notice or cause notice to be given to the Lessee or its successors in interest that certain repairs are required to be made to that part of the Mill Building or machinery demised or occupied or in use hereunder for grist mill purposes, and the Lessee or its successors in interest shall fail within a reasonable time to be designated by the Lessor in such notice, (or if no time be designated then within sixty days from the giving of such notice) to

make the repairs determined to be necessary as aforesaid, then and in that case, all rights of the Lessee under this lease shall at the option of the Lessor, forthwith ipso facto cease and determine.

It is expressly understood and agreed that this lease and all rights of the Lessee and its successors in interest in and to the same and the rights and term hereby demised are in all respects subject and subordinate to the lien of the Mortgage or Deed of Trust made by the Lessor under date of September 1st, 1912 to Guaranty Trust Company of New York as Trustee, and its supplements, whether heretofore or hereafter recorded, securing the First Mortgage 5% Gold Bonds of the Lessor heretofore or hereafter issued, and also that this lease and all rights of the Lessee hereunder are likewise subject and subordinate to the lien of the Mortgage or Deed of Trust made by the Lessor under date of February 1st, 1922 to The Equitable Trust Company of [fol. 59] New York as Trustee, and its supplements, whether heretofore or hereafter recorded, securing the First Lien and Refunding Bonds of the Lessor, whether heretofore or hereafter issued, and that the rights of the Lessee hereunder may be terminable as in said Deeds of Trust or either of them respectively provided, with regard to leasehold interests in this nature, which are subject and subordinate thereto.

Third. The Lessee for itself and its successors in interest expressly covenants and agrees that it will indemnify and hold harmless the Lessor hereunder against any and all claims arising by reason of the use and occupation of the said demised premises for grist mill purposes, including any and all claims that may or might arise or be at any time made against the Lessor for damages to person or property or by reason of any accident, happening or cause whatsoever that may happen or occur upon, in or about the demised premises, that are at the time such accident, happening or cause occurs due to the occupation of the demised premises or any part of same or any part of said Providence Mill property or the land upon which the same is located, for purposes of a grist mill. The Lessee further agrees that it will at no time occupy the demised premises for any purposes other than a grist or flour mill and that it will comply with all laws of the United States and of the

State of Ohio and all local ordinances of any County, Village or Municipality relating to such occupancy of such demised premises.

Fourth. The Lessee shall not assign this lease nor make any alterations on the premises, without the Lessor's consent in writing; nor shall the Lessee underlet or underlease the premises or any part thereof, except to some person, firm or corporation approved by the Lessor. The Lessor or its agents shall have the right to enter upon the demised premises or any part thereof at all reasonable hours for the purpose of examining the same or making such repairs or alterations therein as may be necessary for the safety and preservation thereof. No sign shall be placed on the demised premises except of such a kind and character as from time to time may be approved by the Lessor.

Fifth. The Lessor shall not be liable for any damage or injury by water or electricity or any cause whatsoever which may be sustained by the Lessee or any person or persons whatsoever in or about the demised premises.

[fol. 60] Sixth. This lease may be cancelled and the term thereof caused to expire by the Lessor at any time on thirty days' written notice to the Lessee, upon payment to the Lessee of the sum of Ten thousand dollars ($10,000) less a deduction equal to the aggregate of One hundred dollars ($100) for each twelve months that shall have elapsed from the date of the commencement of the term to the date of such notice.

Seventh. No waiver, express or implied, of any covenant or condition herein or of any breach thereof, or any consent given by the Lessor, shall be held to waive or impair any provision or condition of this lease or any right of the Lessor as to any future act or omission (similar or dissimilar) by the Lessee or any one in possession or upon the demised premises.

Eighth. This agreement and all its provisions and conditions shall extend to and enure to the benefit of the successors and assigns of the Lessor, and of the successors and assigns of the Lessee.

Ninth. The Lessor covenants that the Lessee on paying the said rent and performing the covenants aforesaid, shall

and may peaceably and quitely have, hold and enjoy the said demised premises for the term aforesaid, subject to the provisions, conditions and conditional limitations aforesaid.

In witness whereof, said Lessor has caused its corporate seal to be hereunto duly affixed and this instrument to be duly signed on its behalf by its Vice-President and Secretary, both thereunto duly authorized, and the Lessee has similarly executed the same all as of the day and date first herein mentioned.

The Defiance Gas & Electric Company, by —— ——, Vice-President. —— ——, Secretary. The Providence Mill Company, by —— ——, President.

[fol. 61] State of ——,
County of ——:

On the — day of ——, 1922, before me personally appeared —— —— and Albert B. Muller, both to me known and known to me to be respectively the Vice-President and Secretary of The Defiance Gas & Electric Company, and who being by me duly and severally sworn, did depose and say that he, —— ——, resides in ——, and that he Albert B. Muller, resides in Defiance, Ohio; that they are respectively the Vice-President and Secretary of The Defiance Gas & Electric Company, the Corporation described in and which executed the foregoing lease; that they know the seal of said Corporation; that the seal affixed to said lease is such corporate seal; that it was so affixed and affixed by them by order of the Board of Directors of said Corporation and that they signed their names thereto by like order. And they severally acknowledged said lease to be the free act and corporate deed of said Corporation and of themselves as such Vice-President and Secretary respectively, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and date aforesaid.

—— ——.

State of ——,
County of ——:

On the — day of ——, 1922, before me personally appeared —— —— and —— ——, both to me known and

known to me to be respectively the Vice-President and Secretary of The Providence Mill Company, and who being by me duly and severally sworn, did depose and say that he, —— ——, resides in ——, and that he, —— ——, resides in ——; that they are respectively the Vice-President and Secretary of The Providence Mill Company, the Corporation described in and which executed the foregoing lease; that they know the seal of said Corporation; that the seal affixed to said lease is such corporate seal; that it was so affixed and affixed by them by order of the Board of Directors of said Corporation, and that they signed their names hereto by like order. And they severally acknowledged said lease to be the free act and corporate deed of said corporation and of themselves as such Vice-President and Secretary respectively, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and date aforesaid.

—— ——.

[fol. 62] STIPULATION EXHIBIT No. 4

In the District Court of the United States, Southern District of Ohio, Eastern Division

No. 572. In Equity

THE PROVIDENCE MILL COMPANY, Plaintiff,
vs.
GEORGE F. SCHLESSINGER et al., Defendants

Under the stipulation between the parties hereto, plaintiff offers in evidence sections from the constitutions of Ohio and the general and special laws of Ohio and Indiana and the Congress of the United States listed as follows:

1. Section 1 of Article I of the Constitution of Ohio of 1802.

2. Section 12 of Article VIII of the Constitution of Ohio, as adopted in 1851.

3. Section 12 of Article VIII of the Constitution of Ohio, as amended September 3, 1912.

Acts of the General Assemblies of Ohio and Indiana and of Congress of the United States

4. Act passed February 23, 1820, 18 O. L. 147, Vol. 2, Chase's Statutes, page 1131, entitled: "An act respecting a navigable communication between Lake Erie and the Ohio River."

5. Act passed January 31, 1822, 20 O. L. 31, Vol. 2, Chase's Statutes, page 1220, entitled: "An act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

6. Act passed January 27, 1823, 21 O. L. 24, Vol. 2, Chase's Statutes, page 1255, entitled: "An act supplementary to the act," last above mentioned.

7. "An act in addition to the act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal," passed February 23, 1824, Vol. 3, Chase's Statutes, page 1963.

8. Act passed February 4, 1825, 23 O. L. 50, Vol. 2, Chase's Statutes, pages 1472-76, entitled: "An act to provide for the internal improvement of the State of Ohio by navigable canals."

[fol. 63] 9. An act supplementary to the above acts, passed January 18, 1826, Vol. 3, Chase's Statutes, page 1516.

10. "An act for the protection of the Ohio canals," passed January 31, 1826, Chase's Statutes, Vol. 3, page 1525.

11. "An act to provide for the increase of the Canal Fund by the purchase and sale of real estate," passed February 7, 1826, Vol. 3 Chase's Statutes, page 1527.

12. "And act in addition to the act entitled an act supplementary to the act providing for the internal improvement of the State of Ohio by navigable canals," passed February 8, 1826, Vol. 3 Chase's Statutes, page 1528.

13. Act of the Congress of the United States, passed March 2, 1827, granting lands in the State of Ohio to the State of Indiana, for construction of Wabash & Erie Canal.

14. "An act to amend the act for the protection of the Ohio canals," pased February 11, 1828, Chase's Statutes, Vol. 3, page 1598.

15. An act by the Congress of the United States, passed May 24, 1828, Vol. 4 Statutes at Large, page 305, donating lands in Ohio to the State of Ohio to be sold to provide funds to construct the Miami Extension Canal from Dayton, Ohio to Lake Erie.

16. "An act declaring the assent of the State of Ohio to the provisions and conditions of an Act of Congress," passed December 22, 1828, Chase's Statutes, Vol. 3, page 1619. Through this act the Legislature of Ohio assented to and accepted the terms and conditions of the Act of Congress passed May 24, 1828.

17. "An act to authorize Canal Commissioners to examine into the practicability of extending the Miami line of canal from Mad River, near Dayton, to Defiance at mouth of Auglaize River," passed February 9, 1830, Chase's Statutes, Vol. 3, page 1644.

18. "An act in addition to the several acts for the protection of the Ohio canals and for other purposes," passed February 18, 1830, Chase's Statutes, Vol 3, page 1659.

19. "An act constituting proceeds from sales of canal lands a portion of the general Canal Fund," passed February 23, 1830, 28 O. L. 61.

20. An act of the Congress of United States extending to the State of Ohio the time in which to complete the canal from Dayton to Lake Erie, passed April 2, 1830, Vol. 4 Statutes at Large, page 393.

21. "An act to provide for the purchase of water privileges," passed March 3, 1831, Chase's Statutes, Vol. 3, page 1862.

22. "An act to authorize the selection, location, sale and application of the proceeds of lands granted by Congress to aid the State of Ohio in extending the Miami Canal," passed December 31, 1831, Chase's Statutes, Vol. 3, page 1915, 30 O. L. 14.

[fol. 64] 23. "An act to amend the act to provide for the internal improvement of the State of Ohio by navigable canals," passed February 13, 1832, Chase's Statutes, Vol. 3, page 1917.

24. Resolution by the General Assembly of the State of Indiana conveying to the State of Ohio the lands theretofore granted by Congress to the State of Indiana for construction of Wabash & Erie Canal, passed February 1, 1834.

25. Resolution by the General Assembly of the State of Ohio, passed February 24, 1834, accepting the conveyance of Ohio lands by the State of Indiana to the State of Ohio, which conveyance by Indiana was made pursuant to and under authority of Section 4 of the Act of Congress above mentioned, passed May 24, 1828, Vol. 4 Statutes at Large, page 305.

26. An act providing that all moneys arising from the sale of lands, together with the net proceeds of all tolls, fines and water rents derived from the canal north of Dayton, should be subject to Commissioners of Canal Fund, passed February 27, 1834, 32 O. L. 213.

27. An act directing the Board of Public Works of Ohio to establish the line of the Wabash & Erie Canal from the east line of the State of Indiana to suitable point into Lake Erie, and put the work under contract and carry it along as funds from the sale of land should be received or other money supplied, passed March 3, 1834, 32 O. L. 308.

28. "An act to provide for the extension and completion of the Miami Canal north of Dayton," passed March 8, 1836, 34 O. L. 331.

29. An act appropriating money for the purchase of suitable lands for hydraulic purposes, passed January 12, 1837, 35 O. L. 6.

30. An act appropriating money for purchase of lands and developing of hydraulic power on Miami Canal from Ohio River to Defiance, passed April 3, 1837.

31. "An act relating to the management and sale of certain lands of the State of Ohio," passed March 19, 1838, 36

O. L. 85, Swan's Statutes of Ohio 1841, pages 166 to 170 inclusive.

32. "An act to provide for the protection of the canals of the State of Ohio; the regulation of the navigation thereof and for the collection of tolls," passed March 23, 1840, 38 O. L. 87, Swan's Statutes of Ohio 1841, pages 174 to 200.

33. Swan's Statutes of Ohio of 1841, pages 744 to 764 inclusive.

34. An act directing Board of Public Works to select such of the canal lands belonging to Ohio as might be neces- [fol. 65] sary for the use of water power on the Wabash & Erie Canal and the Miami Canal, passed March 7, 1842, 40 O. L. 72.

35. An act providing for the completion of all parts of the Miami Extension Canal not then under contract, passed February 28, 1843, 41 O. L. 43.

36. "An act in relation to the Miami Canal, the Miami Extension and the Wabash & Erie Canal," passed March 14, 1849, 47 O. L. 44.

37. Revised Statutes of 1880, Sections 7775 to 7779 inclusive, Bates' Annotated Statutes of 1906, Section 218-86 et seq.

38. General Code of 1910, Sections 14009 to 14013 inclusive.

39. "An act to amend Section 14009 of the General Code relating to the sale and leasing of surplus waters of the canals, feeders and dams of the State," passed March 21, 1917, 107 O. L. 418.

Leasing of Entire Public Works

40. "An act to provide for the leasing of the public works of the State," passed May 8, 1861, 58 O. L. 117.

41. Joint resolution of the General Assembly of Ohio extending the lease provided for in the above mentioned act for a period of ten years, passed April 11, 1867, 64 O. L. 330.

Abandonment Acts

42. "An act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami & Erie Canal as a public highway and for sewerage purposes," passed March 24, 1863, 60 O. L. 44.

43. "An act to authorize the city of Toledo to enter upon and occupy a part of the Miami & Erie Canal as a public highway and for sewerage and water purposes," passed March 26, 1864, 61 O. L. 74.

44. "An act to provide for the vacation of the Grandville side-cut, known as the Grandville feeder, emptying into the summit level of the Ohio canal in Licking County," passed April 11, 1866, 73 O. L. 198.

45. "An act to authorize the vacation and sale of a portion of the Hocking canal," passed March 6, 1873, 70 O. L. 306.

46. "An act to provide for the abandonment of a certain portion of the Hocking canal lying eastward of the lock at the village of Chauncey, Athens County," passed April 11, 1876, 73 O. L. 168.

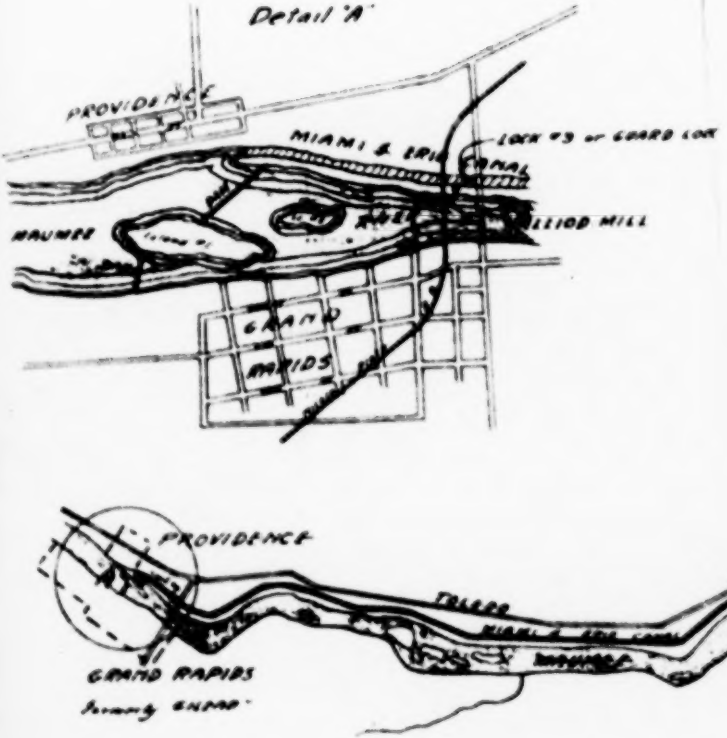
47. "An act to provide for the abandonment and sale of the Wabash & Erie Canal and six-mile reservoir in Paulding County," passed April 12, 1888, 85 O. L. 207.

[fol. 66] 48. "An act to abandon the Wabash & Erie Canal in Paulding County," passed March 3, 1891, 88 O. L. 72.

49. "An act to provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Co.," passed May 18, 1894, 91 O. L. 327.

50. "An act to provide for the abandonment of the Walhonding canal," passed April 27, 1896, 92 O. L. 380.

51. "An act to abandon a portion of the Miami & Erie Canal in Lucas County and to provide for the sale or lease of the same to the city of Toledo, Ohio," passed January 22, 1920, 108 O. L., part 2, pages 1138 to 1141.


Detail "A"
PROVIDENCE
MIAMI & ERIE CANAL
LOCK #3 or GUARD LOCK
OLD RIVER
HILLTOP HILL
RAILROAD
GRAND RAPIDS
PROVIDENCE
TOLEDO
MIAMI & ERIE CANAL
GRAND RAPIDS

STIPULATION EXHIBIT NO. 5

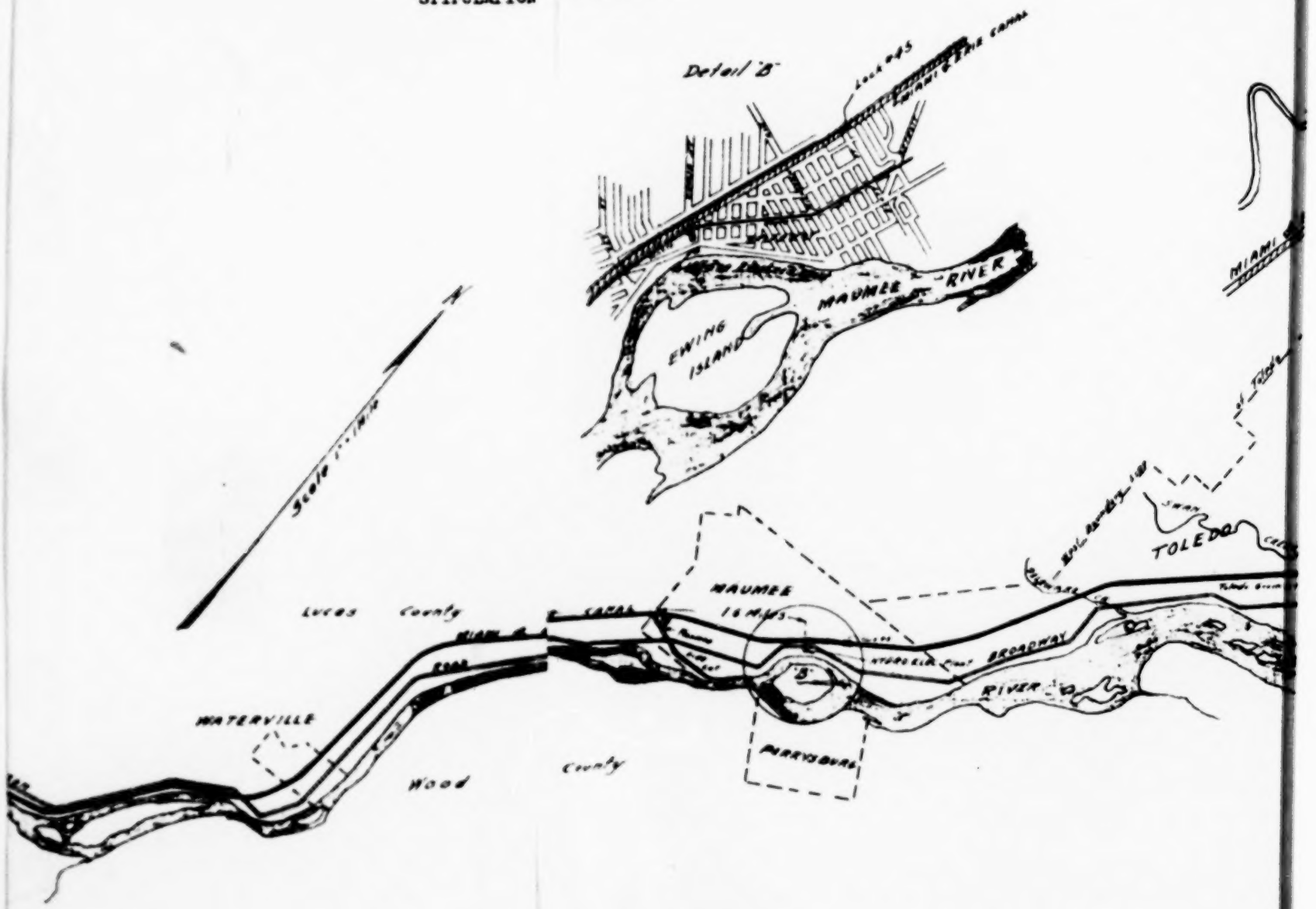
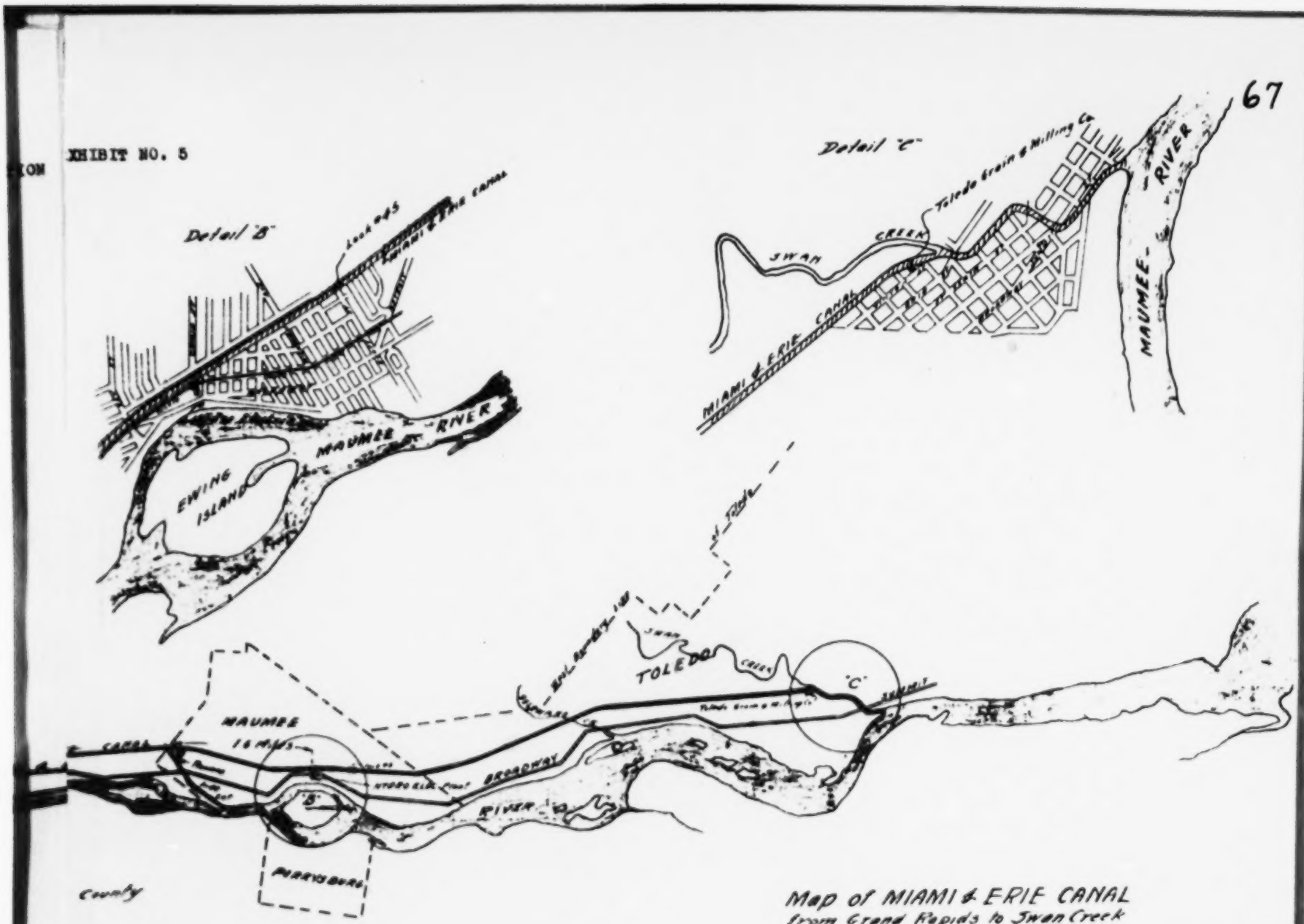


EXHIBIT NO. 5



Map of MIAMI & ERIE CANAL
from Grand Rapids to Swan Creek
Lucas County, Ohio

508-26

52. "An act to abandon for canal purposes that portion of the Miami & Erie Canal between the Maumee River at Defiance, Defiance County, Ohio, and a point five hundred feet north of the Middletown dam, near the north corporation line of the city of Middletown, Ohio, and to provide for the leasing of certain portions of the same to cities, villages and other political subdivisions of the State and for granting of leases outside of municipalities, etc.," passed March 25, 1925, 111 O. L. 208 to 214.

53. "An act to abandon a portion of the Miami & Erie Canal in Lucas County, Ohio, and to provide for the sale of the same to the County Commissioners of Lucas County, Ohio," passed March 27, 1925, 111 O. L. 367 to 370.

54. "An act to abandon for canal and hydraulic purposes that portion of the Miami & Erie Canal from a point five hundred feet north of the State Dam, near the corporation line of the city of Middletown, Paulding County, Ohio to the present terminus of said canal at St. Bernard in the city of Cincinnati, Hamilton County, Ohio," passed April 21, 1927, 112 O. L. 388 to 390.

55. "An act to abandon a portion of the Miami & Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," passed over the Governor's veto May 11, 1927, 112 O. L. 360 to 363.

(Here follows Stipulation Exhibit No. 5, marked side folio page 67)

[fol. 68] In United States District Court

[Title omitted]

Interlocutory Injunction Order—Filed April 14, 1928

At Columbus, in said District, Before the Honorable Maurice H. Donahue, Circuit Judge, the Honorable Smith Hickenlooper, and the Honorable Benson W. Hough, District Judges

The hearing of the application of the plaintiff for an interlocutory injunction herein, having been fixed for 9:30

[fol. 69] o'clock A. M. on the 14th day of April, 1928, in the Federal Building at Columbus, Ohio, in said District, and due notice of such hearing having been given to the Honorable Vic Donahey, Governor of the State of Ohio, and to the Honorable Edward C. Turner, Attorney General of the State of Ohio, and to all of the persons who are defendants in this suit, towit, George F. Schlessinger, individually and as Director of the Department of Highways of the State of Ohio, Richard D. Wisda, individually and as Superintendent and Director of the Department of Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, individually and as County Commissioners of Lucas County, Ohio; and each and all of the foregoing persons and parties having acknowledged the service of such notice, said application came on to be heard on said date and at the time and place aforesaid before the Honorable Maurice H. Donahue, a Circuit Judge, the Honorable Smith Hickenlooper and the Honorable Benson W. Hough, District Judges, constituting a special statutory court under the provisions of Section 266 of the Federal Judicial Code, for an interlocutory injunction against the defendants restraining and suspending the enforcement, operation and execution of a statute (hereinafter more particularly referred to) of the State of Ohio, upon the ground of its unconstitutionality, in accordance with the prayer of the bill of complaint; and it appearing to the Court that the plaintiff is the owner of a flour and feed mill situated on the Miami and Erie Canal near the point where said canal emerges from the Maumee River at the village of Providence in Lucas County, Ohio; that said mill is operated by water power generated by water taken from said canal pursuant to a conveyance of the same from the State of Ohio [fol. 70] to plaintiff's predecessor in title, his heirs and assigns forever; that the value of said water power is in excess of the sum of $75,000, exclusive of the value of said flour and feed mill; that under the act of the General Assembly of the State of Ohio, dated the 11th day of May, 1907, and published in 112 Ohio Laws, page 350, the defendants propose to, and unless enjoined by the Court, will, drain the water from said portion of said canal, fill up and otherwise obstruct said portion and prevent further water of the Maumee River from flowing into or through the

same, thereby destroying plaintiff's said water power, to its great and irreparable damage; that as against the threatened acts of the defendants as aforesaid the plaintiff has no adequate remedy at law and that an interlocutory injunction should issue enjoining the defendants and each of them as prayed for in the bill of complaint herein; it is therefore ordered that the defendants and each of them and all of their officers, agents, associates, appointees and employees, respectively, be and they hereby are temporarily enjoined and restrained from in any way preventing, interrupting, lessening, interfering with or otherwise abridging or injuriously affecting (a) the use by the plaintiff of the canal water in that portion of the Miami and Erie Canal extending from the state dam and the intake adjacent thereto, located in the Maumee River immediately south of Providence, Ohio, to the said mill of the plaintiff located on said canal approximately one-half mile northeasterly of the same; (b) the flowage of water from said river into said canal at said dam and intake; (c) also, from diverting, causing or permitting to be diverted, either into said river or otherwise and whether at said dam or elsewhere [fol. 71] where, any of the water of said canal which, except for such diversion, would and will be available to the plaintiff in said canal at its said mill; (d) from opening or causing or permitting to be opened, any sluice gate or passage, the opening of which would or will lessen or otherwise injuriously affect either the volume or flowage of water in said portion of said canal between the points in (a) first aforesaid; (e) from closing or obstructing, whether wholly or partially, any gate or passage now available or usable for the conveyance of water from said river into said portion of said canal; (f) from constructing or erecting or from causing or permitting to be constructed and erected any bulkhead, dam or other structure or obstruction, the purpose or result of which would be to prevent or lessen the flow of water in any part of said portion of said canal; and from doing, suffering or permitting any other act or thing in any way violative of the rights of the plaintiff secured to it under and by virtue of the said grant of water power executed by the State of Ohio to plaintiff's predecessor, his heirs and assigns forever, as aforesaid—all until

the final hearing and determination of this cause or until the further order of this court.

It is further ordered that this interlocutory injunction order shall take effect upon the giving by the plaintiff of a bond in the sum of $2,000.00, executed with sufficient surety to the approval of the Clerk of this court, conditioned to secure the defendants and each of them the damages they may sustain, if it be finally decided that this interlocutory injunction should not have been granted.

Thereupon the plaintiff tendered to the Clerk of this court its said bond in said sum, executed by the Metropoli- [fol. 72] tan Casualty Insurance Company of New York, as surety, and the same was duly approved as aforesaid. All of which is done as of the said 14th day of April, 1928.

Maurice H. Donahue, United States Circuit Judge for the Sixth Circuit. Smith Hickenlooper, United States District Judge. Benson W. Hough, United States District Judge.

Approved: L. W. Hunt, Solicitor for Roy. E. Davis, Ralph E. Farnsworth, and George R. Hoffman, individually and as County Commissioners of Lucas County, Ohio. Edward C. Turner, Attorney General of Ohio; A. M. Colland and J. A. Godown, Special Counsel, Solicitors for George F. Schlessinger, individually and as director of the Department of Highways of the State of Ohio, and Richard D. Wisda, Individually and as Supt. and Director of the Department of Public Works of the State of Ohio.

[fols. 73-75] Bond on interlocutory injunction for $2,000, approved and filed November 2, 1928, omitted in printing.

[fol. 76] In United States District Court

[Title omitted]

Before Donahue, Circuit Judge, Hickenlooper and Hough, District Judges

(Under Authority of Section 266 Judicial Code)

Opinion—Filed Sept. 7, 1928

Hough, District Judge:

The plaintiff company, a corporation, seeks injunction, enjoining the defendant Schlesinger, as Director of the

Department of Highways of the State of Ohio, and as Superintendent and Director of the Department of Public Works of said state, from carrying out the mandate of the General Assembly of Ohio, contained in an Act passed by it on the 11th day of May, 1927 (112 O. L., 360). That mandate directed the said defendant officer of the state, to drain the water from a section of the Miami & Erie Canal, designated as Lineal Part 2, and to prevent the water of the Maumee River from flowing into such section.

[fol. 77] The claims of the plaintiff company are founded upon a grant in perpetuity to one Minor, of September 1st, 1842, which was made in settlement of the claims of Minor arising from the appropriation and destruction of his private dam, mill race and mill, during the original construction of the canal by the State of Ohio.

A full statement of the case is found and the conclusions under the issues presented, follow and conform to the decision of the case of the Maumee Valley Electric Company v. Schlesinger as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, and others, No. 534 In Equity, this day handed down, and to which reference is herein made, and upon the further authority of the case of State ex rel. vs. The Middletown Hydraulic Company, (114 O. S., 437), which case presented a like situation.

Prayer of petition granted and injunction allowed.

Donahue, Circuit Judge, Hickenlooper, District Judge, concur.

[fol. 78] In United States District Court

[Title omitted]

Motion to Substitute Party Defendant—Filed Sep. 6, 1928

Now comes the plaintiff and respectfully represents and shows to the court that since the institution of the above entitled suit on March —, 1928, and during the pendency of said suit said defendant, George F. Schlessinger, resigned from the office of Director of Highways of the State of Ohio on June 15, 1928 and on that day ceased to hold said office,

and plaintiff further represents that on said date of June 15, 1928 one Harry J. Kirk was duly appointed to said office of Director of Highways of the State of Ohio; that he thereupon duly qualified as such officer under the laws of Ohio and since then he has been and he still is the duly appointed, qualified and acting Director of Highways of the State of Ohio as the successor in said office to said George F. Schlessinger, resigned as aforesaid.

Plaintiff further represents that there are grave and difficult questions involved in said suit and that there is substantial need for continuing and maintaining said cause and obtaining an adjudication of the questions involved in order that plaintiff's property rights of great value involved in said suit may be properly and finally determined.

Wherefore, plaintiff respectfully moves the court for an [fol. 79] order permitting and directing said suit to be continued and maintained against said Harry J. Kirk, as the Director of Highways of the State of Ohio and successor in that office to said George F. Schlessinger, resigned as aforesaid.

U. G. Denman and Karl G. Burr, Solicitors for Plaintiff.

To the Honorable the Judges in the above-entitled cause in the United States District Court for the Southern District of Ohio, Eastern Division:

The undersigned, Harry J. Kirk as Director of Highways of the State of Ohio, through his counsel, the Attorney General of Ohio, duly authorized under the laws of Ohio, hereby this Sixth day of September, 1928 acknowledges receipt of a copy of the above motion by the plaintiff in the above entitled cause, voluntarily enters his appearance as a defendant in said cause, and hereby expressly consents to the granting of said motion and that said cause be continued and maintained against him as the successor in the office of the Director of Highways of the State of Ohio to George F. Schlessinger resigned, in order that an adjudication of the questions involved in said cause may be obtained.

Harry J. Kirk, Director of Highways of the State of Ohio, by Edward C. Turner, Attorney General of Ohio.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING HARRY J. KIRK AS PARTY DEFENDANT—
Filed Sept. 8, 1928

This day this cause came on to be heard on the motion of the plaintiff for an order to permit and direct the above entitled cause to be continued and maintained by the plaintiff against Harry J. Kirk, as successor in the office of the Director of Highways of the State of Ohio to his predecessor in that office, George F. Schlessinger resigned, and the court being fully advised in the premises finds that said George F. Schlessinger resigned from the office of Director of Highways of the State of Ohio on June 15, 1928 and on that day ceased holding said office as such officer; that said Harry *H.* Kirk is the duly appointed, qualified and acting Director of Highways of the State of Ohio as the successor in said office to said George F. Schlessinger, resigned as aforesaid; that said Harry J. Kirk has been duly notified of the filing and pendency of said motion; that he expressly consents to the granting thereof by this court and to a substitution of himself as such Director of Highways of the State of Ohio as a defendant in said cause in the place of his predecessor in said office, George F. Schlessinger, resigned as aforesaid; that there is substantial need for continuing and maintaining said cause and obtaining an adjudication of the questions involved therein; and that said above entitled cause should be permitted to be continued and maintained by the plaintiff against said Harry J. Kirk as such successor in said office of Director of highways of the State of Ohio.

Now, therefore, it is ordered that said cause be and the same hereby is continued and shall be maintained by the [fol. 81] plaintiff against said Harry J. Kirk as Director of Highways of the State of Ohio and as a defendant in this cause and that all orders heretofore entered by this court in said cause be and they hereby are continued and shall stand against said Harry J. Kirk as defendant as aforesaid in this cause and as the successor to said George F. Schlessinger in the office of the Director of Highways of the State of Ohio until the further orders of this court.

Maurice H. Donahue, Circuit Judge. —— ——, District Judge. Benson W. Hough, District Judge.

[fol. 82] In United States District Court

No. 572. In Equity

The Providence Mill Company, Plaintiff,

vs.

George F. Schlessinger, Individually and as Director of the Department of Highways of the State of Ohio; Richard D. Wisda, Individually and as Superintendent and Director of the Department of Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, Individually and as County Commissioners of Lucas County, Ohio, Defendants

Final Decree—Filed Dec. 3, 1928

This cause, coming on to be heard at this term on the pleadings, proofs and arguments of counsel, was thus heard before and was determined by Honorable Maurice H. Donahue, United States Circuit Judge, and Honorable Benson W. Hough and Honorable Smith Hickenlooper, United States District Judges, constituted and sitting as a court in this cause under Section 380 of Title 28 of the United States Code, formerly Section 266 of the United States Judicial Code, it being then agreed by and between counsel for all parties and the court that thereafter there should be filed in this cause the answers of the defendants and the stipulation and agreement between the parties, plaintiff and defendants, on the evidence, with the stipulation exhibits referred to therein and attached thereto, now filed herein; and thereupon, upon consideration thereof, former defendant George F. Schlessinger having resigned from and quit the office of Director of the Department of Highways of the State of Ohio on June 15, 1928, and Harry J. Kirk having been thereupon duly appointed under the laws of Ohio as Director of the Department of Highways of the State of Ohio and having been duly substituted as a defendant in this cause as such Director of the Department of Highways of said State succeeding said former defendant George F. [fol. 83] Schlessinger, resigned as aforesaid, and said Harry J. Kirk as Director of Highways as aforesaid having voluntarily entered his appearance in this cause as a defendant therein succeeding said George F. Schlessinger, resigned

as aforesaid, and said Harry J. Kirk being since such substitution and entry of appearance as aforesaid and now the duly appointed, qualified and acting Director of the Department of Highways of the State of Ohio, it is ordered, adjudged, and decreed as follows, viz:

1. That on the issues joined in this cause the court finds for the plaintiff and against the defendants, including therein that the provisions of the Act of the General Assembly of the State of Ohio, hereinafter specifically described mentioned and referred to, declaring or attempting to declare all leases, agreements and grants of and with and from the State of Ohio for water to be taken thereunder from that portion of the Miami and Erie Canal specifically described in said Act, to be null, void and of no effect and directing the State Highway Director of Ohio to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said portions of said canal and granting permission to the defendants to fill up said canal and obstruct the flow of the waters therein, are contrary to and in contravention of the Constitution of the United States and therefore null, void and of no effect with respect to and as affecting, or intended to affect, the leases, agreements and grants mentioned, described, referred to and set out in the Bill of Complaint and the record of this cause, namely, the agreement and grant between Peter Minor and the State of Ohio of September 1, 1842, as readjusted by the proceedings between said Minor and the State of Ohio through its then Board of Public Works on February 10, 1846, and the lease from The Defiance Gas & Electric Company, successor in title to the rights of said Peter Minor under said agreement and grant of September 1, 1842, as readjusted as aforesaid on February 10, 1846, to the plaintiff in this cause, which lease to the plaintiff herein expires by its terms on the 19th day of December, A. D. 2004.

[fol. 84] 2. And that the defendant Harry J. Kirk, Director of Highways as aforesaid, and each of said other defendants and his and their successor, respectively, and his and their officers, agents, associates, appointees and employees and their respective successors in office and position be and they hereby are, during the existence of plaintiff's

said lease, agreement and grant, expiring as aforesaid, enjoined (a) from in any way or by any means draining or, except by the plaintiff, causing or permitting to be drained from that portion of the Miami and Erie Canal, or any part thereof, described as commencing at the guard lock, so-called, and otherwise known as lock No. 9 and lock No. 44 of said canal, and extending thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's Survey, to and including the point or place where said canal joins with the Maumee River on the northwesterly side thereof and above or southwesterly from the Grand Rapids, Ohio State Dam in Providence Township, Lucas County, Ohio, and being a part of that portion of said Miami and Erie Canal as described and referred to in Section 1 of an Act of the General Assembly of Ohio, entitled "An act to abandon a portion of the Miami and Erie Canal in Lucas County, Ohio and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," passed May 11, 1927 and found on pages 360 to 363 inclusive of Volume 112 of the Laws of Ohio, any of the waters of said canal which, except for such draining, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring on December 19, A. D. 2004 as aforesaid; and (b) from doing, or causing to be done, any act, matter or thing in any way or by any means with respect to said Maumee River, or said part above described of said Miami and Erie Canal as extending from said guard lock No. 9 to and including the point or place where said canal joins with said Maumee River, that would prevent or in anywise interfere with, or obstruct, the continuous flow into or [fol. 85] throughout the part of said canal described as aforesaid, of any of the waters of or from said Maumee River or of said part of said canal which, except for such prevention, obstruction or interference, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring as aforesaid.

It is further ordered, adjudged, and decreed that the plaintiff have and recover from the defendant Harry J. Kirk, as Director of the Department of Highways of the State of Ohio, its costs herein expended taxed at $—, for which execution is hereby awarded.

Smith Hickenlooper, District Judge. Benson W. Hough, U. S. District Judge.

Approved: Edward C. Turner, as Attorney General, and Albert M. Calland, Special Counsel, and Joseph A. Godown, Special Counsel, Solicitors for Defendants Kirk and Wisda. U. G. Denman and Karl E. Burr, Solicitors for Plaintiff.

[fol. 86] In United States District Court

[Title omitted]

Petition for Appeal to the Supreme Court of the United States—Filed Jan. 3, 1929

The defendants herein, conceiving themselves aggrieved by the decree made and entered on the 3rd day of December, 1928, in the above entitled cause, do each severally hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and pray that cost bond on appeal be fixed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Krueger, Assistant Prosecuting Atty., Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 3, 1929

Now come the defendants herein and severally file the following assignment of errors upon which they will severally rely upon the prosecution of the appeal herein from the decree of this Honorable Court, dated December 3, 1928:

1. That the District Court erred in decreeing the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive plaintiff of rights without due process of law under leases and agreements referred to in the final decree of said District Court.

2. That the District Court erred in decreeing the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, so as to impair the obligations of agreements and leases between plaintiff and the State of Ohio referred to in the final decree of said District Court in contravention of and contrary to the Constitution of the United States.

[fol. 88] 3. That the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, is not in contravention of or contrary to the Constitution of the United States.

4. That the decree herein is contrary to the law.

Wherefore, the defendants severally pray that said decree be reversed.

Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Kreuger, Assistant Prosecuting Atty., Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

[fol. 89] In United States District Court

No. 572. In Equity

The Providence Mill Company, Plaintiff,

vs.

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, Successor to and Substituted for George F. Schlesinger, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio, Defendants

Order Allowing Appeal—Filed Jan. 3, 1929

On application of defendants, it is ordered that an appeal to the Supreme Court of the United States from the final decree herein be, and the same is hereby, allowed, that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of one thousand dollars ($1,000.00).

Benson W. Hough, Judge of the United States District Court, Southern District of Ohio.

[fols. 90-93] Bonds on appeal for $1,000.00, approved and filed January 3, 1929, omitted in printing.

[fols. 94 & 95] Citation, in usual form, showing service on U. G. Denman and Karl E. Burr, filed January 3, 1929, omitted in printing.

[fol. 96] In United States District Court

[Title omitted]

Præcipe for Transcript of Record on Appeal—Filed Jan. 3, 1929

To the Clerk:

Please prepare transcript of record on appeal in the above entitled cause for the Supreme Court of the United States, and include therein the following:

1. Title page.
2. Caption.
3. Bill of Complaint.
4. Answers of defendants.
5. Stipulation and agreement between the parties plaintiff defendant on the evidence, and the stipulation exhibits attached thereto numbered 1 to 5, both inclusive.
6. Order granting interlocutory injunction.
7. Bond of plaintiff.
8. Opinion of the Court.
9. Motion for the consent to the substitution of Harry J. Kirk, as party defendant.
10. Order substituting Harry J. Kirk, as party defendant.
11. Final decree of the Court.
12. Petition for appeal.
13. Assignment of errors.
14. Order of Court allowing appeal and fixing amount of appeal bond.
15. Bonds of defendants.
16. Copy of citation and acknowledgment of service thereof.
17. Præcipe for transcript of record.
18. Stipulation re certification of record.
19. Clerk's certificate showing what portions of the record are included by request of each party.

[fol. 97] Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Krenger, Assistant Pros. Atty., Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

Service of a copy of the foregoing præcipe is hereby acknowledged this 3rd day of January, 1929. All parts of the record desired by Appellee, The Providence Mill Company, are named in the Præcipe.

U. G. Denman, Karl E. Burr, Solicitors for Plaintiff.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE CERTIFICATION OF RECORD—Filed Jan. 3, 1929

In accordance with the General Rules of this court, it is hereby agreed by and between the parties by their respective counsel that the record as presented to the Clerk by the printer may be certified by the Clerk, as required by law, as a true, full and complete copy of the original pleadings, papers, exhibits and orders used on the trial of this cause, as set forth in the præcipe for transcript, without further comparison by the Clerk.

Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Kreuger, Assistant Prosecuting Attorney, Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

[fols. 99 & 99½] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 100 & 100a] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING THE TIME FOR DOCKETING CASE AND FILING RECORD—Filed in Supreme Court Feb. 2, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 16th day of January, 1929.

Benson W. Hough, District Judge.

[fols. 100b & c] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING THE TIME FOR DOCKETING CASE AND FILING RECORD—Filed in Supreme Court Feb. 2, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 2nd day of February, 1929.

Benson W. Hough, District Judge.

[fol. 100d] [File endorsement omitted.]

[fol. 101] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF NECESSARY PARTS OF THE RECORD—Filed Feb. 16, 1929

The appellants contend that the act of the General Assembly of Ohio, passed May 11, 1927, and found in 112 Ohio Laws, p. 360, sections 14178, 14178-12, inclusive, of the General Code of Ohio, does not

(a) deprive plaintiff of any property or rights without due process of law;

(b) impair the obligation of any contract growing out of the leases, agreements and grants of the appellee.

Appellants' contention is based on the following:

In constructing and maintaining the Miami and Erie canal, as a part of the general canal system of the State of Ohio, the State of Ohio acted in a sovereign or governmental capacity. The leases of water from said canal for hydraulic power purposes were entirely incidental and subordinate to the main purpose and were therefore, also acts in a sovereign or governmental capacity.

Until the General Assembly of the State of Ohio determined and declared that the Miami and Erie canal, or any part thereof, should no longer be maintained, it continued to be a canal and the maintenance thereof continued to be a

[fol. 102] sovereign or governmental function. The actual cessation of transportation on the canal did not change its character. It continued to be a canal until the General Assembly of Ohio, by its act of May 11, 1927, declared that the *its character. It continued to be a canal until the General Assembly of Ohio, by its act of May 11, 1927, declared that the* property occupied by the canal should be devoted to another public purpose, to-wit, the construction of a highway.

All leases for hydraulic power purposes made from the time the canal was constructed until the General Assembly, by its act of May 11, 1927, declared the necessity of abandoning the canal and devoting the property to another public purpose, were made by the state in its sovereign or governmental capacity, and were all subject to the sovereign or governmental power of the state to abandon and discontinue the canal and use the property for other public purposes.

The State, having the right to abandon the canal for navigation purposes, upon the passage of the Act of May 11, 1927, had the right to withdraw the water from the canal without liability to appellee.

The State, having by the Act of May 11, 1927, declared the necessity of abandoning the canal, is required to return the water to the Maumee River at the point where the water is now run into the canal, so that the water will flow in its natural water-course, namely, the Maumee River, through the Villages of Waterville and Maumee, and a part of the City of Toledo.

The lease from the State of Ohio to the appellee was executed and delivered after the Supreme Court of Ohio and the Supreme Court of the United States had determined that the lease of surplus water of the canal would not impose upon the State an obligation to keep up the canal for the sole purpose of meeting the requirements of such lease, that the State was not required to maintain the canal for navigation for a longer period than public necessity seemed [fol. 103] to require; that whenever the public necessity no longer required the canal it might be abandoned, and if abandoned, the water might be withdrawn altogether, and that the withdrawaing of the water from the canal pursuant to abandonment created no liability in favor of the

owner of leases, except to forego the further collection of rents or refund a reasonable portion of so much of the rents as had been paid in advance.

The State, by receiving consideration on account of water lease, cannot thereby change to a public purpose the incidental use of supplying of water to holders of the leases; such incidental use of the canal is a private use as distinguished from a public one and continues as such notwithstanding the acts of any officers of the State.

The State, by its having made the lease and having accepted the considerations thereunder, cannot, in the absence of legislation expressly so declaring, change the public purpose of a canal from "navigation" to "furnishing water pursuant to water leases," even though the use of the canal for navigation purposes had been discontinued by the public.

The abandonment of the canal for navigation could not result from the lack of use thereof by the public, but must result from legislative enactment by the State, first declared by the act of May 11, 1927, as to the part of the canal here involved. The lease in question was executed under and pursuant to 38 Ohio Laws, 87, 113, enacted March 23, 1840. Pertinent sections are sections 20, 21, 22 and 23 of Chapter 23, Swan's Statutes of Ohio, 1841 (shown without change in sections 218-86-87-88-89 of Bates Revised Statutes, Fifth Edition, Sections 14009-10-11-12, General Code of Ohio, 1910), from which time until 1894 the canal was used by the general public for navigation purposes.

[fol. 104] The authority granted to the Board of Public Works by 38 Ohio Laws, 87-113, cannot be enlarged by implication as a result of the change of conditions after the enactment thereof by the General Assembly.

Therefore:

The appellee has no vested right to continue the use of the surplus water from said canal after the abandonment and discontinuance thereof by the state and has no property right therein for which it is entitled to compensation.

The sovereign or governmental power of the state to abandon or discontinue the Miami and Erie canal was a part of the lease, agreement and grant to the appellee, and the act of the General Assembly abandoning and discontinuing the canal is in accordance with the lease, agreement and grant and does not impair any provision thereof.

Appellants think the following parts of the record are necessary for the consideration of the points above set out:

1. Title page.
2. Caption.
3. Bill of Complaint.
4. Answers of defendants.
5. Stipulation and agreement between the parties plaintiff and defendant on the evidence, and the stipulation exhibits attached thereto numbered 1 to 5, both inclusive.
6. Order granting interlocutory injunction.
7. Bond of plaintiff.
8. Opinion of the Court.
9. Motion for and consent to the substitution of Harry J. Kirk, as party defendant.
10. Order substituting Harry J. Kirk, as party defendant.
11. Final decree of the Court.
12. Petition for appeal.
13. Assignment of errors.
14. Order of Court allowing appeal and fixing amount of appeal bond.
15. Bonds of defendants.
16. Copy of citation and acknowledgment of service thereof.

[fols. 105 & 106] 17. Præcipe for transcript of record and acknowledgment of service thereof.

18. Stipulation re certification of record.
19. Certification of transcript of record.

Respectfully submitted.

Gilbert Bettman, Attorney General; Joseph A. Godown, Special Counsel, Solicitors for the Appellant Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio. George W. Ritter, Solicitors for the Appellants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

Appellee, The Providence Mill Company, through its counsel, hereby acknowledges service of the above Statement of Points and Designation of Necessary Parts of the Record in the above entitled cause, this 11th day of February, 1929, and said appellee, through its said counsel, designates the same parts of the record in said cause for

printing on the appeal as are above designated by appellants.

The Providence Mill Company, Appellee, by U. G. Denman and Karl E. Burr, Its Solicitors and Counsel.

[fols. 107-110] [File endorsement omitted.]

Endorsed on cover: File No. 33,984. Southern Ohio, D. C. U. S. Term No. 675. Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, etc., et al., appellants, vs. The Providence Mill Company. Filed February 4th, 1929. File No. 33,984.

In United States District Court

[Title omitted]

Order Enlarging the Time for Docketing Case and Filing Record—Filed in Supreme Court April 12, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 16th day of February, 1929.

Benson W. Hough, District Judge.

[File endorsement omitted.]

IN THE

Supreme Court of the United States

No. 675.

OCTOBER TERM, 1928.

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY C. EVANS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division.

STATEMENT OF CLAIM AS TO JURISDICTION UNDER RULE No. 12 OF THIS COURT.

Appellants appeal to this court from a permanent injunction order enjoining the performance by an officer of

the state of Ohio of duties imposed upon him by certain laws of that state, which injunction was granted by three judges in the District Court of the United States, southern district of Ohio, to appellee, pursuant to a bill in equity filed in said court on April 14, 1928 (Rec., pp. 1-17). The court, consisting of three judges, on April 14, 1928 (Rec., p. 68), granted an application of the appellee for an interlocutory injunction prayed for pending a final hearing of the cause for a permanent injunction. The cause thereafter came on for final hearing on the merits, pursuant to the issue joined by the several answers of appellants before Hon. Maurice H. Donahue, United States circuit judge of the sixth circuit, the Hon. Benson W. Hough, and Hon. Smith Hickenlooper, district judges for the southern district of Ohio (Rec., p. 76).

The Ohio statutes complained of by appellee are Sections 14178 to 14178-12, inclusive, of the General Code of Ohio, as passed May 11, 1927, by the general assembly of Ohio, as found in 112 O. L., pp. 360, 363, entitled:

"An Act

> To abandon a portion of the Miami and Erie canal in Lucas county, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith."

Under the terms of the act such portion of the canal was abandoned, all leases of any character thereon were declared void within sixty days after its effective date and the canal property turned over to the superintendent of public works and director of the department of highways and public works of the state of Ohio for highway

and park purposes. The superintendent of public works and director of the department of highways and public works is an officer of the state of Ohio appointed pursuant to Sections 154-1, 154-3, 154-4, 154-40, 404, 411 and 412 of the General Code of Ohio.

The appellee set forth in detail the ownership by it of certain water rights evidenced by agreements and grants in certain leases to it or its predecessors from the state of Ohio, of which it was the assignee, by virtue of which it claimed the right to take water from the Miami and Erie canal and alleged that the superintendent of public works and director of the department of highways and public works of the state of Ohio, pursuant to the provisions of said act of the general assembly, would, unless restrained from so doing, drain the water out of the portion of the canal which is abandoned by the act. (Rec., p. 17.)

On September 7, 1928, said court, constituted as aforesaid, announced its written opinion (Rec., p. 76), finding in favor of the appellee, The Providence Mill Company, permanently enjoining the superintendent of public works and the director of the department of highways and public works, a state officer, from the enforcement of such statutes on the ground that the statutes were unconstitutional.

On December 3, 1928, the three judges of said court entered a final decree (Rec., p. 82), adjudging that said act of the general assembly of Ohio, in so far as it provided for cancellation and termination of the leases from the state of Ohio to appellee, and authorized and directed

the appellant, the superintendent of public works and the director of the department of highways and public works of the state of Ohio, to drain the water from said canal prior to the expiration of the terms of said leases, was a taking of the property of the appellee in violation of the obligation of contracts and due process clauses of the United States Constitution.

On January 3, 1929 (Rec., p. 86), defendants in said District Court (appellants here) filed a petition for appeal to this court, which was duly allowed by the District Court and an order issued accordingly fixing the amount of the appeal bonds (Rec., p. 89). Thereafter the District Court, by several orders, enlarged the time for the docketing of the appeal and the filing of the record thereof with the clerk of this court to February 16, 1929. On February 4, 1929, appellants docketed this cause and filed the record thereof with the clerk of this court.

Upon the statutory jurisdiction of this court to review this cause upon appeal, we call attention to Section 380, United States Code, Title 28, Section 380 (Judicial Code, Section 266, as amended), as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon

the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: **Provided, however,** that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: **Provided,** that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In reference to the cases appealable to this court under the provisions of Section 266, Judicial Code, as amended, Mr. Justice Brandeis, in the case of In re Buder, 271 U. S., 461 (70 L. Ed., 1036) at page 465, directs attention to the purpose of a paragraph added at the end of Section 266, Judicial Code, by amendment, as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing of such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

and then further adds:

> "As so amended, Section 266 also permits a direct appeal to this court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges."

In reference to cases reviewable in this court by direct appeal, from the District Court, in the case of Clerk et al. v. Poor, et al., 274 U. S., 54, in the headnote, it is said:

> "The final judgment of the District Court, three judges sitting, which dismisses the bill challenging the constitutionality of a state statute and seeking to enjoin its enforcement, is reviewable in this court upon appeal, under Judicial Code, Section 266, as amended by act of February 13, 1925, when an interlocutory injunction has been applied for and a restraining order issued. (p. 556.)"

From the nature of the case, and it appearing that a state officer has been permanently enjoined from carrying out the provisions of an act of the general assembly of Ohio as repugnant to the provisions of the Constitu-

tion of the United States, we think it is manifest that the final decree, rendered by the court below on the merits, is one from which a direct appeal lies to this court.

Respectfully submitted,

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